

1 REPORTER'S RECORD
2 TRIAL COURT CAUSE NO. 04-CR-3453-C
3 APPELLATE COURT CAUSE NO. AP-76,000 76100
4 VOLUME 11 OF 25 VOLUMES

5 THE STATE OF TEXAS) IN THE DISTRICT COURT
6 VS.) 94TH JUDICIAL DISTRICT
7 JOHN HENRY RAMIREZ) NUECES COUNTY, TEXAS

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INDIVIDUAL VOIR DIRE

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19 On the 13th day of November, 2008, the
20 following proceedings came on to be heard in the
21 above-entitled and numbered cause before the HONORABLE
22 BOBBY GALVAN, Judge Presiding, held in Corpus Christi,
23 Nueces County, Texas:

24 Proceedings reported by Stenograph
25 Machine.

**FILED IN
COURT OF CRIMINAL APPEALS**

OCT 06 2009

Louise Pearson, Clerk

1 APPEARANCES:

2 MR. MARK SKURKA
SBOT NO. 18475570
3 MR. VERNON G. SCHIMMEL
SBOT NO. 24033039
4 ASSISTANT DISTRICT ATTORNEYS
901 Leopard, Rm. 205
5 Corpus Christi, Texas 78401
Phone: (361) 888-0410

6 ATTORNEYS FOR THE STATE

7 -AND-

8 MR. EDWARD F. GARZA
9 SBOT NO. 07731200
ATTORNEY AT LAW
10 719 S. Shoreline, Suite 201
Corpus Christi, Texas 78401
11 Phone: (361) 888-8877

12 MR. GRANT JONES
SBOT NO. 10917000
13 ATTORNEY AT LAW
5826 Beauvais Dr.
14 Corpus Christi, Texas 78414
Phone: (361) 815-2470

15

16 ATTORNEYS FOR THE DEFENDANT,
JOHN HENRY RAMIREZ

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PROCEEDINGS

1 November 13, 2008

2 THE COURT: When we were off the
3 record, I was told that there is somebody maybe we can
4 agree on?

5 MR. SKURKA: Yes, Your Honor. We've
6 reviewed the questionnaire on Juror No. 39.

7 THE COURT: Okay.

8 MR. SKURKA: He did not finish his last
9 five pages on the thing and he may have gone to school
10 with Mr. Ramirez at Moody High School --

11 THE COURT: Okay.

12 MR. SKURKA: -- so both sides have agreed
13 to excuse him.

14 MR. GARZA: That's correct, Your Honor.

15 THE COURT: All right. We called him off
16 or we're going to try?

17 THE BAILIFF: Okay. Which juror?

18 MR. SKURKA: If you can call 39 and tell
19 him he doesn't have to come. He's scheduled to come
20 at 10.

21 THE COURT: Okay. We'll try and call him
22 off.

23 All right, what else? We ready on the --
24 on Mr. Yazdaninia?

25 A. Yes, sir.

1 Q. When are you planning to leave?

2 A. Well, I usually leave, according to that,
3 what I take my day off, personal day off from school.
4 I work for C.C.I.S.D. I'm a teacher at Grant Middle
5 School. And I talked to my principal, if it's
6 possible I can leave before the holiday starts, so a
7 week before holiday starts.

8 Q. Okay. So when is that?

9 A. Well, I mean, our holiday is to -- this year,
10 I think it starts at December 14, I believe, or
11 something like that, but I'm intending to, you know,
12 to leave at that time. I did not want to talk to you
13 about it because I haven't gotten my ticket, due to
14 financial problem that I have, so, I mean, I just need
15 some money to -- to travel, so...

16 Q. So you are going to -- you plan to leave on
17 December the 14th.

18 A. The 14, something like that, 14, or maybe
19 earlier, maybe later, but I have to go. Somehow I
20 need to get to see her.

21 Q. No, I -- look, look, I mean, if your mother's
22 ill, I mean, there's nobody here that wants to prevent
23 you --

24 A. No, I understand --

1 MR. SKURKA: Yes, Judge.

2 THE COURT: All right. Now, you say that
3 he's got an issue?

4 MR. SKURKA: He says that he has a sick
5 mother in Iran, and he's got a trip planned to Iran in
6 mid December.

7 THE COURT: Okay. We'll talk to him
8 about it. All right, bring him in.

9 (Venireperson enters courtroom.)

10 THE COURT: All right.

11 VENIREPERSON NO. 36,

12 AHMAD YAZDANINIA,

13 VOIR DIRE EXAMINATION

14 BY THE COURT:

15 Q. All right. You are Mr. Yazdaninia?

16 A. Yes, sir.

17 Q. All right. Mr. Yazdaninia, we're going to
18 talk to you about a few things. First and foremost, I
19 understand that you have a trip overseas.

20 A. Yes, sir, that I attend every year.

21 Q. Okay.

22 A. Because of my ill mother that I visit every
23 year.

24 Q. Okay. Well, I certainly can understand that.

25 Q. -- from going.

1 A. -- but I have proof that I can -- that I've
2 been there the last five, six years.

3 Q. No, I believe you.

4 A. Yes, sir.

5 Q. We're not --

6 A. No, I'm here, sir. Sir, if I -- if I can
7 help in any way I'll be glad to serve, I have no
8 problem --

9 Q. Okay.

10 A. -- to do my civic duty, yes, sir.

11 Q. Okay. Well, here's kind of the deal.

12 A. Yes, sir.

13 Q. I don't expect this case would be going -- I
14 think it's -- we're going to start December the 1st.

15 Let's see here, that week -- I think December the 1st
16 is actually a Monday. Let's see here, December the
17 1st is a Monday, and I can tell you that first week
18 through the 5th, we're going to be working, for sure.

19 A. Yes, sir.

20 Q. Okay? And -- and then we might be working
21 through part or maybe even all of the next week, but I
22 think we'll be done by the 12th.

23 A. Yes, sir.

24 MR. SKURKA: I agree, Judge.

1 THE COURT: You think so?
 2 MR. SKURKA: Yes, sir.
 3 THE COURT: I -- what do you guys think?
 4 MR. JONES: I'm sorry, I'm --
 5 THE COURT: Well, he says he's leaving on
 6 the 14th. I think we'll be done by the 14th, myself.
 7 But, I mean, you guys know the evidence better than I
 8 do.
 9 MR. JONES: But --
 10 THE COURT: If you don't think so --
 11 MR. JONES: -- the problem is, the end of
 12 the -- the end of the case, just because of the kind
 13 of case it is, may be the most critical --
 14 THE COURT: Uh-huh, I agree.
 15 MR. JONES: -- part.
 16 THE COURT: Okay.
 17 MR. JONES: We don't know how long the
 18 deliberations will last.
 19 THE COURT: Okay.
 20 MR. JONES: And any time lawyers estimate
 21 how much time it's going to take, it usually takes
 22 longer, so...
 23 THE COURT: Well, we're hoping it's a
 24 week.
 25 MR. JONES: But given his -- his

1 VOIR DIRE EXAMINATION
 2 BY MR. SKURKA:
 3 Q. Hi, Mr. Yazdaninia. Did I say it right?
 4 A. It's close, sir.
 5 Q. Close enough.
 6 A. Yes, sir.
 7 THE COURT: Close enough.
 8 Q. (BY MR. SKURKA) So I don't feel bad. My name
 9 is Skurka, and people have --
 10 A. Yes, sir.
 11 Q. -- trouble with that, too, so I'm --
 12 A. Yes, sir.
 13 Q. -- used to calling me Mark. How about that?
 14 A. Yes, sir. And you call me Yaz, sir, Y-a-z.
 15 The kids call me Yaz, Mr. Yaz.
 16 Q. Mr. Yaz.
 17 A. Y-a-z, yes, sir.
 18 Q. Well, that makes it easy for all of us.
 19 A. Much easier for all of us, yes, sir.
 20 Q. We appreciate it.
 21 A. Yes, sir.
 22 Q. Let me -- let me get to the -- the gist of
 23 the thing. You're -- you haven't bought a ticket,
 24 yet, correct?
 25 A. No, sir.

9

1 situation with his parent, I'm --
 2 THE COURT: Well, you want to talk about
 3 this for a second?
 4 MR. JONES: Well, I mean, he would be
 5 distracted, I think. He'd be worried about it.
 6 THE COURT: Well --
 7 MR. JONES: Plus, he's -- if he's going
 8 to be spending -- his airline tickets are going to be
 9 --
 10 THE COURT: He hasn't -- he hasn't bought
 11 it, though.
 12 MR. JONES: No, but if he gets it, it's
 13 going to be an expensive ticket.
 14 THE COURT: Yeah, no, I agree.
 15 MR. JONES: And you can't -- he's going
 16 to have problems, you know, rescheduling --
 17 THE COURT: Okay.
 18 MR. SKURKA: May I follow-up just on that
 19 area?
 20 THE COURT: Yeah, yeah. Why don't you
 21 talk to him --
 22 MR. SKURKA: Okay.
 23 THE COURT: -- about it?
 24
 25

11

1 Q. You think -- or you're planning on leaving on
 2 the 14th, which I think is a Sunday.
 3 A. Yes, sir.
 4 Q. Because it would be the end of the second
 5 week.
 6 A. Uh-huh.
 7 Q. What we have here is a trial --
 8 A. Yes, sir.
 9 Q. -- that may take a week, probably, for sure,
 10 but I don't think it's going to go much into the
 11 second week.
 12 A. Yes, sir.
 13 Q. And if it does, it's not going to take the
 14 whole week, --
 15 A. Yes, sir.
 16 Q. -- I don't believe. And that's just based
 17 on, like, the attorney says, --
 18 A. Yes, sir.
 19 Q. -- a guess.
 20 A. Yes, sir.
 21 Q. And so I can almost -- my -- my suggestion
 22 is, I would think 99 percent we'll be through by the
 23 14th.
 24 A. Yes, sir, I understand.
 25 Q. Okay? So, here's the question.

1 A. Uh-huh.

2 Q. If you can -- if you're going to leave on the
3 14th and we can be through, can you sit on this jury?

4 A. The main thing, sir, again, as I've said, I
5 would like to do my civic duty. I've been on a civil
6 suit --

7 Q. Uh-huh.

8 A. -- and I enjoyed being in that, really. But
9 the main thing in here for me is -- is my mother's
10 situation is that she's incapacitated. She cannot
11 move, she cannot do anything on her own. And,
12 actually, my family and a nurse taking care of her.

13 Q. I see.

14 A. And the main thing in my mind is pretty
15 much -- like last night I was on the phone. They
16 constantly call me and talk to me. And usually the
17 phone calls are like after 12:00 because that's the
18 only way they can get hold of me. And usually up 2,
19 3:00, something, 2:00, an hour, two hours talking to
20 them, just because that's mother. I mean, I'm sure we
21 all have mother to think about, you know, at this age
22 more think about them, and so I don't have -- my
23 father passed away awhile back, and -- and the main
24 thing it is, I'm just worried about it. It's just not
25 that I don't want to, but that's what, as I mentioned

1 A. My mother's situation is getting worse.
2 That's the problem, they're constantly taking her to
3 the hospital, bringing -- since two or three years
4 ago, I know that her heart problem, part of her body
5 is -- is not movable, at all. That's why she's not --
6 cannot even go to the rest room -- bathroom.

7 THE COURT: She's pretty sick, at this
8 point.

9 VENIREPERSON NO. 36: Pretty much sick,
10 yes, sir.

11 Q. (BY MR. SKURKA) So -- so what you're saying
12 is, unfortunately something may happen during the next
13 two weeks that you may have to leave early.

14 A. Yes, sir. I might be --

15 Q. Is that what you're saying?

16 A. Yes, that's what I'm saying. But, again, as
17 I said, I really -- I mean, I could have, you know, I
18 could have buy the ticket, but I -- I didn't have
19 money to buy it. I'm trying to find, because of
20 financial problem that I have, and that's another
21 case. I would have gone earlier if I could find the
22 money, but my main thing concerns really to serving is
23 just like my mind as, again I mentioned, open-minded,
24 it just got to have free mind to sit and listen to all
25 the argument that going on in here and --

1 on the -- on the form, that my concern's in her, and
2 if something happened I need to go, and that's part --
3 and my mind needs to be set. And I know that you
4 mentioned something about open-minded.

5 Q. Uh-huh.

6 A. I do remember that, sir, I'm a teacher. And
7 -- and I know being open-minded thing in jury case
8 like this, you know, you got to have open-minded. And
9 in my mind occupied with, you know, problem that I
10 have over there, you know, because of my mother it's
11 going to be a little bit tough for me. I can try. I
12 mean, I'm -- again, as I said, whatever you-all set
13 for me's is fine, but --

14 Q. And that's what we're trying to say, too.

15 A. Yes, sir.

16 Q. I'm so sorry about your mother's situation --

17 A. Yes, sir.

18 Q. -- but I can't really tell --

19 A. Yes, sir.

20 Q. -- if it's a thing that's been that way for a
21 long time --

22 A. Yes, sir.

23 Q. -- or it's getting steadily worse.

24 A. Yes, is -- is getting steadily worse.

25 Q. Okay.

1 Q. So you think --

2 A. -- and make up your mind.

3 Q. So you think --

4 A. That's all.

5 Q. -- because of your mom's situation, that
6 might interfere with you being on the jury.

7 A. That's what I'm trying to say. And the main
8 thing, I have pretty much when they call me, I'm up to
9 1, 2:00 in the morning and next day I need to be in
10 here, a matter of being tired and, you know, concerns
11 about that situation. Beside that one, there's no
12 other concerns that I have, sir.

13 Q. Well, we think you'd make a fine juror, but
14 we don't think -- we don't want to really interfere
15 with your situation with your mom.

16 A. Well, thank you very much, and hopefully any
17 time that, I mean, --

18 THE COURT: All right.

19 A. -- if I can come back and be a part of it,
20 I'll be, you know --

21 THE COURT: All right.

22 Q. (BY MR. SKURKA) We understand. And what you
23 said is exactly right, this is such an important case

24 --

25 A. Yes.

	16		18
1	Q. -- we want people to be focusing on it.	1	THE COURT: All right.
2	A. Yes, sir.	2	MR. JONES: That's...
3	Q. And, unfortunately, you've got some personal	3	THE COURT: That's fine. You know, I'm
4	things.	4	afraid if his mom gets sick, then we've lost a person.
5	A. Absolutely.	5	MR. JONES: Yeah, right.
6	Q. Thank you for bringing that to our attention.	6	MR. SKURKA: And that's why I wanted to
7	A. Thank you, sir. Appreciate it. Thank you,	7	follow-up, because he didn't have plane tickets
8	sir.	8	bought. I couldn't really tell if she was just in the
9	THE COURT: Okay. Mr. Yazdaninia, we're	9	nursing home and he goes to visit her every so often,
10	going to do this, if it's okay, I think it's okay with	10	or if she was really going downhill, but it sounds
11	both sides.	11	like she's going downhill.
12	MR. GARZA: Yes.	12	THE COURT: All right. We have the next
13	THE COURT: We're going to let you go --	13	person, Lonnie Johnson (sic).
14	VENIREPERSON NO. 36: Yes, sir.	14	THE BAILIFF: Yes, sir.
15	THE COURT: You're not going to make it	15	THE COURT: Okay.
16	on this jury. Maybe in the future --	16	(Venireperson enters courtroom.)
17	VENIREPERSON NO. 36: Yes, sir.	17	THE COURT: All right. Come forward.
18	THE COURT: -- you may be in a better	18	
19	situation to serve --	19	VENIREPERSON NO. 38,
20	VENIREPERSON NO. 36: Yes, sir.	20	RONNIE RAY JOHNSTON, III,
21	THE COURT: -- and we certainly want you	21	VOIR DIRE EXAMINATION
22	to be, okay?	22	BY THE COURT:
23	VENIREPERSON NO. 36: Thank you very	23	Q. You are Lonnie Johnston?
24	much, Judge.	24	A. Yes, sir.
25	THE COURT: But we appreciate you coming	25	Q. All right. We're going to talk to you about
	17		19
1	down here --	1	a few things, okay?
2	VENIREPERSON NO. 36: Thank you.	2	A. Okay.
3	THE COURT: -- and talking to us and	3	Q. We're looking to pick a jury here.
4	being honest with us about things, --	4	Obviously, you know that.
5	VENIREPERSON NO. 36: Thank you very	5	A. Yes, sir.
6	much.	6	Q. And what we're looking for is people that can
7	THE COURT: -- okay?	7	keep an open mind.
8	VENIREPERSON NO. 36: Appreciate it.	8	A. Of course.
9	Thank you, sir.	9	Q. All right? Because it's not fair, otherwise,
10	THE COURT: All right.	10	right?
11	VENIREPERSON NO. 36: Is that it?	11	A. No.
12	THE COURT: If you need a work excuse --	12	Q. You agree with that?
13	VENIREPERSON NO. 36: Yes, sir.	13	A. Of course not, yes.
14	THE COURT: -- my bailiff can help you	14	Q. And we want people that can keep an open
15	with that.	15	mind, and we want people that can follow the law. So,
16	VENIREPERSON NO. 36: Thank you very	16	let me ask you question number one, can you keep an
17	much, sir.	17	open mind in this case?
18	THE COURT: Thank you for coming, Mr.	18	A. Yes, sir.
19	Yazadaninia.	19	Q. Okay. Have you made up your mind about this
20	MR. SKURKA: Thank you, sir.	20	case one way or the other?
21	(Venireperson exits courtroom.)	21	A. No, I have not.
22	MR. SKURKA: Judge, for the record, --	22	Q. All right. All right, then, let's talk about
23	THE COURT: Agreed strike?	23	the law. You have never been on a criminal jury
24	MR. SKURKA: -- the State will agree to	24	before.
25	excuse Juror No. 36.	25	A. No, sir.

1 Q. Okay, that's okay. We're going to talk to
 2 you a little bit about what -- what it's about. And
 3 that is, first of all, in every criminal case in this
 4 country the burden of proof is on the State, that is,
 5 the State's brought the charges and the law says,
 6 "State, you bring the charges, that's fine, but you
 7 got to prove them because you brought them."

8 A. Yes, sir.

9 Q. You agree with that?

10 A. Yes, sir.

11 Q. Okay. And the burden of proof -- you've
 12 heard of it, I'm sure, you probably remember it from
 13 school and you've seen it on T.V., and stuff like that
 14 -- is beyond a reasonable doubt. You ever heard of
 15 that before?

16 A. Yes, sir.

17 Q. All right. So beyond a reasonable doubt.
 18 Now, we don't have a definition, but it is the highest
 19 burden that we have in the law, okay?

20 A. Okay.

21 Q. And you agree that -- well, that's the law,
 22 okay? Could you hold the State to that burden?

23 A. Yes, I would.

24 Q. All right. Now, it doesn't mean beyond all
 25 doubt or beyond a shadow of a doubt, but it does -- it

1 is the idea that the burden of proof never shifts. In
 2 other words, the Defense never has any burden to do
 3 anything. You follow me?

4 A. Yes, I -- Defense doesn't have to prove
 5 anything.

6 Q. Defense doesn't have to prove anything. They
 7 don't have to put on any evidence, okay? That's what
 8 the law says. And now some people say, "Well, I like
 9 to hear both sides of the story," but it's not like
 10 that because it's not about both sides of the story,
 11 because you brought the charges and you got to prove
 12 them, right?

13 A. Of course.

14 Q. Okay. So we're not -- you know, it's not
 15 exactly like that. So, as part of that, the Bill of
 16 Rights of our U. S. Constitution says Defendant
 17 doesn't have to take the stand, all right? And I
 18 submit there's lots of reasons why that may be true,
 19 okay? Maybe -- maybe his lawyers say, "You know what,
 20 we advise you not to take the stand because they
 21 haven't proven their case," okay.

22 Maybe Defendant is just not -- just isn't
 23 an eloquent speaker. You know, he's not educated,
 24 maybe he's -- maybe he just freezes up in high-stress
 25 situations. And you can understand why that would be

1 is -- it is -- it's not just, you know, kind of sort
 2 of, all right?

3 A. Yeah.

4 Q. It's more than that.

5 A. Of course.

6 Q. Okay, you could hold the State to that.

7 Now, as part of the concept that the
 8 State's got the burden of proof. Obviously, a person
 9 -- if they've got the burden of proof, then a person's
 10 innocent until they can prove it, right?

11 A. Yes.

12 Q. Okay. And that's what the law says. The law
 13 says, "State, you got the burden of proof and until
 14 you prove it, if you can prove it, you may not be able
 15 to, but until you can prove it every person in this
 16 country is innocent until proven otherwise." You
 17 agree with that?

18 A. Yes, I do.

19 Q. Okay. All right. And you could -- and --
 20 and you could presume the Defendant in this case to be
 21 innocent until they prove otherwise.

22 A. Yes, sir.

23 Q. If they can.

24 A. That is true.

25 Q. All right. Now, intertwined with all of this

1 a high-stress situation.

2 A. Of course.

3 Q. Okay?

4 A. Oh, yes.

5 Q. You might even be a little nervous yourself
 6 sitting there. Maybe not.

7 A. A little.

8 Q. A little, right?

9 A. Of course.

10 Q. Yeah. And you're not on trial.

11 A. No, exactly.

12 Q. Okay? So, you know, there's lots of reasons
 13 why a person may not want to testify, all right?
 14 Would you -- could you follow the law that said a
 15 Defendant does not have to testify and the jury can't
 16 hold it against him?

17 A. If that's what the law states.

18 Q. That's what the law states. Not only does it
 19 say he doesn't have to testify and they can't make
 20 him, but you can't go back there to deliberate and
 21 say, "You know what, I'm -- I would have to hear from
 22 him and if I don't hear from him, Mr. Skurka, you
 23 get," that's the prosecutor over here, "Mr. Skurka
 24 gets a star and so I'm going to tip the scales this
 25 way for him." Can't do that.

	24		26
1	A. No, sir.	1	or eight out of the elements and not prove all nine.
2	Q. You wouldn't do that?	2	I don't know how many there are, but, you know,
3	A. No, no.	3	there's -- there's a number of them. They don't just
4	Q. Okay. All right. Let's talk a little bit	4	get to get pretty close.
5	about the kind of case this is --	5	A. Yeah.
6	A. Okay.	6	Q. They have to get them all.
7	Q. -- and the process. This is a capital murder	7	A. Yeah.
8	charge, okay?	8	Q. You -- you could hold them to that burden.
9	A. Yes, sir.	9	A. Oh, yes.
10	Q. And -- and that means that it is the type of	10	Q. All right. Now, in -- in Texas we have
11	murder in which the death penalty can be a punishment.	11	what's called a "bifurcated system," all right? What
12	A. Yes, sir.	12	does that mean, all right? That means that there's
13	Q. All right. It can be triggered. But I think	13	two parts to the trial, okay? First part is guilt or
14	it's a common misconception that every -- people think	14	innocence. That is, the State tries to prove to the
15	that every murder is a capital, okay? You -- you seem	15	jurors that Defendant's guilty of the charge they've
16	to understand that that's not the case.	16	brought, --
17	A. Yes, sir.	17	A. Yes, sir.
18	Q. All right. There's plain murder, which I	18	Q. -- okay? If they are unsuccessful and the
19	kind of hate saying. I just haven't figured out a	19	jury finds the Defendant not guilty, the case stops.
20	better way to say it, but there's plain murder, which	20	If however, they're successful and -- then we go on to
21	is the intentional taking of another's life, and then	21	the punishment phase, which is the second part of the
22	there's capital murder. And there's a laundry list	22	trial.
23	that the legislature has given us as to situations of	23	In the second part of the trial, if the
24	murder in which capital -- is capital murder, okay?	24	Defendant is found guilty of capital murder, there's
25	In this case, what -- and I like to call	25	two possibilities, life in prison or death, okay?
	25		27
1	it murder plus, okay? Think of it as murder plus.	1	It's not just -- it's not just death automatically or
2	A. Okay.	2	life automatically, okay?
3	Q. In this case, the State is alleging murder,	3	A. Yes, sir.
4	plus, while in the course of committing or attempting	4	Q. But you don't say life or death. The jury
5	to commit a robbery, in the forcible taking of	5	doesn't -- I mean, most cases, like, let's say it was
6	something --	6	a regular murder, the jury would come back with a
7	A. Yes.	7	punishment, maybe a number of years, maybe probation,
8	Q. -- from another, okay?	8	maybe a fine would be added, maybe a combination of
9	A. Okay.	9	those, okay? But we don't do that in capital murder.
10	Q. So they have to prove the whole thing. They	10	Capital murder we answer questions, okay? And here's
11	don't get to say -- you don't -- they don't get to	11	the first question, they call it "Special Issues."
12	say, "Well, we've proven you the murder, but the	12	"Is there a probability the Defendant would commit
13	robbery part..."	13	criminal acts of violence that would constitute a
14	A. Yeah.	14	continuing threat to society," okay?
15	Q. Okay? Now, he may be guilty of murder or he	15	A. Okay.
16	may be guilty of robbery or he may not be guilty of	16	Q. Okay. And the jury would answer yes or no,
17	anything, okay? But what I'm saying is this, they	17	then you go on to Special Issue No. 2, "After taking
18	have to prove each and every element of the offense of	18	into consideration all of the evidence, including the
19	capital murder for them to get a conviction for	19	circumstances of the offense," that's the first part
20	capital murder. You follow me?	20	of the trial, okay, the guilt or innocence part, and
21	A. Yes, sir.	21	then, "the Defendant's character and background and
22	Q. Okay. Could you hold them to that -- to that	22	the personal moral culpability of the Defendant, is
23	burden?	23	there a sufficient mitigating circumstance or
24	A. Yes, sir.	24	circumstances to warrant a sentence of life
25	Q. In other words, they don't get to prove seven	25	imprisonment, rather than death sentence be imposed?"

1 Okay?

2 And what is this all about? Well, the
3 first part of the trial, you're just going to hear
4 about whether the State can prove that this Defendant
5 is guilty beyond a reasonable doubt or not guilty.
6 And you're pretty much just going to hear about what
7 happened that day, okay, if they can -- see what they
8 can -- prove that -- what they've alleged that day.

9 A. Yes, sir.

10 Q. Unclear at this point because we haven't
11 heard anything, okay?

12 A. Of course.

13 Q. The second part of the trial you may hear
14 other things, like, I don't know, about his
15 background, maybe his criminal history. What kind of
16 guy was he? Is he a good guy? Is he a bad guy? Does
17 he do work for the community? Is he -- is he
18 generally a good person to his fellow man, all right?

19 A. (Nods head.)

20 Q. And -- and then you can decide whether taking
21 into consideration everything, sort of like a global
22 look, okay?

23 A. Okay.

24 Q. Not just that day, but everything.

25 A. Yes.

1 can't do that myself."

2 A. Of course.

3 Q. Or, some people say, "Look, if I -- I could
4 also participate in the guilt or innocence phase, but
5 if he gets convicted of capital murder, I don't care
6 about these special issues. I'm going answer them in
7 such a way I think somebody that gets convicted of
8 capital murder should always get death, no matter
9 what," okay? Those people can't take the oath, all
10 right?

11 A. Of course not.

12 Q. Okay. I'm asking you, can you take the oath
13 and truthfully answer these questions if we get to
14 that point?

15 A. Yes, sir.

16 THE COURT: Okay. All right, I'm going
17 to turn the floor over to Mr. Skurka, and he's the
18 prosecutor for the State. He gets to go first because
19 he's got the burden of proof.

20 VENIREPERSON NO. 38: Okay.

21 VOIR DIRE EXAMINATION

22 BY MR. SKURKA:

23 Q. How you doing today, Mr. Johnston?

24 A. I'm doing good, how are you?

25 Q. My name is Mark Skurka. I'm an assistant

1 Q. Everything about the person. Does it -- does
2 -- you know, these -- are there enough mitigating
3 circumstances or, you know, that -- that warrant a
4 life sentence, rather than a death sentence? All
5 right? And then the jury would answer yes or no to
6 that question, okay?

7 A. Okay.

8 Q. Now, I need to know from you -- well, let me
9 -- let me tell you this. At the beginning of every
10 trial, I give the jurors an oath, and that oath goes
11 something like this, "Do you solemnly swear that you
12 will render a true verdict based upon the law and the
13 evidence," and then the jury says, "Yes." But I need
14 to ask you, can you take that oath, first of all, to
15 render a true verdict on the guilt or innocence phase,
16 based upon the law and the evidence presented to you?
17 Can you do that?

18 A. Yes, sir.

19 Q. Okay. And then I need to ask you on these
20 two questions. And before you answer, I want to tell
21 you, some people tell me, "I just -- you know, I could
22 participate perhaps in the guilt or innocence phase,
23 but I can't get to this phase. I can't participate
24 and I can't take your oath because I cannot answer
25 questions that may lead to someone's death, okay? I

1 district attorney, and the young man that was with me
2 a few minutes ago is Geordie Schimmel. He's also an
3 assistant D.A. He's the one that's assigned to Judge
4 Galvan's Court, so he's going to be helping me present
5 the evidence in this case if you get selected on this
6 jury, okay?

7 A. Yes.

8 Q. I want to start off by saying there's no
9 right or wrong answers. All you have to do is tell us
10 how you feel. I don't want you to answer in such a
11 way you think I want to hear it or the Judge wants to
12 hear it or they want to hear it. I just want to know
13 how you truly feel about something, okay?

14 A. Of course, yes, sir.

15 Q. Fair enough. When you first heard -- when
16 you first heard it was a capital murder case or you
17 heard there may be a death penalty case, remember that
18 first day when you walked in and found out it was that
19 kind of case, what was your first reaction?

20 A. My first reaction, I didn't really know what
21 to think because I -- I know nothing about the case,
22 as far as anything goes so I just knew it was a
23 capital murder trial, and I didn't even know what the
24 -- what the punishment would be, you know, but...

25 Q. Yeah, capital murder means there's a chance

1 for death penalty.

2 A. Yes.

3 Q. And the Judge, I think, told you that pretty
4 soon when he first came in --

5 A. Yes.

6 Q. -- and he said it's a capital --

7 A. Yes.

8 Q. -- murder case. When you heard it was that
9 kind of case and you may have to sit on that type of
10 jury, what was your reaction?

11 A. I didn't -- I didn't, like, shy away from it.

12 I feel it's like our duty to serve on a -- on a jury.

13 And we have to be open-minded, and I...

14 Q. Okay. Did you see other people around you in
15 the audience react? They all reacted differently,
16 didn't they?

17 A. Of course, everybody's going to have a
18 different reaction when it's this type of case.

19 Q. Right. And I saw -- and I was watching them,
20 because I saw some people going like, "Oh, my gosh, I
21 can't believe I got this kind of case," --

22 A. Yes, sir.

23 Q. -- and then some people said "Well, that's
24 interesting, but, you know, I got to serve and do what
25 I got to do."

1 Q. And you understand that you have to wait
2 until you hear everything before you make such a
3 decision.

4 A. Oh, of course.

5 Q. But make no mistake, I told you the very
6 first day, the State is going to seek the death
7 penalty. If you're seated on this jury, there's going
8 to be a time that sometime in this trial when I'm
9 going to stand before you and ask you to find him
10 guilty, based on the evidence. And I'm going to ask
11 you to answer the questions in such a way that that
12 guy gets the death penalty. And we're not talking
13 about somebody you just, you know, hear about on the
14 news. There he is, right there in that shirt.

15 A. Yes.

16 Q. Look at him and tell me, can you participate
17 in that decision if it calls for it?

18 A. Yes, sir.

19 Q. Okay. No hesitation there.

20 A. (Shakes head.)

21 Q. Okay. It's not something that people want to
22 do, are happy to do.

23 A. Of course not.

24 Q. But you understand as part of our Judicial
25 Justice System, we need people to come out and make

1 A. Yes, sir, it's our duty.

2 Q. Is that kind of how you felt?

3 A. Yes, sir.

4 Q. Okay. Because sometimes people say -- and
5 it's okay to say this, they say, "Well, look, if, you
6 know, I thought it was going to be a D.W.I. case or a
7 burglary case. And, my gosh, now, I'm going to have
8 to make this kind of decision, I can't do that. I
9 can't sit on that kind of case." Did you feel that
10 way?

11 A. No, sir.

12 Q. Why not?

13 A. I don't know, I just -- it didn't bother --
14 it didn't bother me, like -- I don't know, I -- I just
15 didn't feel like I couldn't make the choice. I felt
16 that if I was selected, I'd make the right choice
17 according to the facts that are presented.

18 Q. That's a good answer because that's the way
19 you should do it, make a decision based on the facts
20 that's presented. You didn't come in with any
21 preconceived notion, right?

22 A. No.

23 Q. You didn't say, "Well, I know he must be
24 guilty because he looks guilty," did you?

25 A. Oh, no, of course not.

1 those kind of hard decisions.

2 A. Of course, a jury of your peers.

3 Q. Very good. "Jury of your peers." You know,
4 even as powerful as the district judges like Judge
5 Galvan or the District Attorney Carlos Valdez, they
6 can't make that decision. We trust the people, the
7 jurors, to make that kind of decision. Do you agree
8 with that system?

9 A. Yes, sir.

10 Q. People complain about our system, but it's
11 still the best in the world, don't you think?

12 A. I agree.

13 Q. And it may not be perfect, but it's better
14 than a lot of other ones, --

15 A. (Nods head.)

16 Q. -- right? And you understand that's a pretty
17 awesome responsibility.

18 A. Oh, it definitely is.

19 Q. I mean, you're a young guy.

20 A. Yes, sir.

21 Q. You're going -- If you're on this jury,
22 you're probably going to be one of the youngest people
23 on the jury.

24 A. Okay.

25 Q. You feel like you can step up in those shoes

1 and fill those shoes and do it?

2 A. I don't -- I don't believe my age will really
3 play that big a factor in it.

4 Q. Good answer, because you know what I was
5 going to ask you next? Look at him. He seems kind of
6 young himself, doesn't he?

7 A. Yes, sir.

8 Q. He's probably just a little older than you or
9 maybe just a little older than you.

10 A. He looks it.

11 Q. Does that have any effect on you?

12 A. No.

13 Q. Would you agree with me that you should judge
14 people by what they did and not what they look like or
15 how old they are?

16 A. Of course, you can't judge people on what
17 they look like.

18 Q. All right. And even age, because in Texas,
19 they have a law that says you cannot seek the death
20 penalty on people under 18 years of age. I mean, they
21 could do the worst crime in the world and if they're
22 16 years old, they can't get the death penalty. But
23 the law also says over 18, you know, I guess they
24 recognize that if you're over 18, you're old enough to
25 know the difference between right or wrong, or you're

1 little bit, but just tell me, in general, if somebody
2 had come up to you, you know, before you got --
3 because I know what happens is, you come in the jury
4 room and then you start really thinking about it a
5 lot. Had you thought about the death penalty before,
6 and, if so, what were your feelings?

7 A. My feelings, I'm not really like -- of
8 course, I'm not, like, overly for the death penalty,
9 because I -- of course, nobody ever likes to see
10 people die. But I'm not against it in any way. I'm
11 -- if the case and the crime were to permit it, it
12 would be one of the possible choices that you're going
13 to have to make, but I'm not saying that every case
14 warrants the death penalty.

15 Q. That's exactly what the law says. You said,
16 "Every case doesn't warrant the death penalty." The
17 law says the same thing, because in Texas there's only
18 a few certain types of case you can even be eligible
19 to get the death penalty. You know, if you kill a cop
20 while they're on duty, or, you know, killing a kid
21 under six years old, or killing more than one person
22 at the same time, or if you kill them while you're
23 raping them, kidnapping them, burglarizing them, or
24 robbing them, those kind of cases, and there's a few
25 more where they're eligible for the death penalty.

1 old enough to know what the law is, correct?

2 A. Of course, you are.

3 Q. Do you agree with that?

4 A. Yes, sir.

5 Q. I mean, you seem like a pretty mature guy for
6 your age, and I wish I was that mature when I was 22.
7 But the seriousness is, age may be some kind of factor
8 you think about, but do you think that's really going
9 to make the decision on what the outcome of the case
10 is?

11 A. Not -- no, not age. Basically, because you
12 have to hear everything in the case, you can't make a
13 decision just based upon age

14 Q. Right. But as long you're over 18, I mean,
15 -- I mean, obviously, I mean, the law says you can't,
16 you know, give the death penalty to somebody under 18.

17 A. Of course.

18 Q. But do you agree that over 18 you should know
19 what's going on and -- and face the consequences of
20 your actions?

21 A. Yes, I believe once you're 18, you -- you
22 definitely know the difference between right and
23 wrong.

24 Q. Sure. Tell me about the death penalty. Now,
25 that's one of the big issues, and we've hit on it a

1 So you kind of agree with how the Texas
2 Court set it up that way, the law sets it up, right?

3 A. Yes.

4 Q. I mean, if you forge a check or you steal
5 something, that doesn't necessarily mean you're going
6 to get the death penalty.

7 A. No.

8 Q. It's got to be a very serious crime.

9 A. Yes, sir.

10 Q. And it's not automatic by any means, right?

11 A. Oh, no. Definitely not.

12 Q. Sometimes people say, "Well, gosh, you know,
13 we found him guilty of capital murder, he
14 automatically gets the death penalty," and I have to
15 say, "Wait a minute, there's two choices, death or
16 life in prison, depending on what the evidence says."

17 A. Yes, sir.

18 Q. Have you ever read in the paper, like, maybe
19 it will say something, or on the news it will say
20 "This guy who was charged with burglary got 20 years
21 in prison, and this guy who got charged with burglary
22 got 5 years probation." Why -- why do you think that
23 happens?

24 A. I guess there's different circumstances in
25 every case, that no case is going to be alike. And

1 different jurors, they pick different -- different
2 sentencing. That's as far as I can tell.

3 Q. And that's an excellent answer. Different
4 circumstances call for different punishments. Maybe
5 one person, you know, the guy got 20 years had been in
6 prison before for burglary and it's his third time
7 he's been to prison for burglary. The second guy,
8 maybe he's a first-time offender, you know, he's never
9 even been arrested before and he gets probation, okay?
10 See what I'm saying?

11 A. Yes.

12 Q. You can't judge until you hear all the facts.

13 A. Of course not.

14 Q. And that's what the Judge was very careful in
15 going over with you. You can't prejudge things and
16 you have to wait. Because if you just say, two
17 burglars, and you think, well, why aren't they given
18 the same, well, there's probably a reason why they're
19 not given the same.

20 A. Yes, sir.

21 Q. And that's what -- the kind of decision
22 you're going to have make in this case. So you don't
23 think you'll have a problem participating in this type
24 of case?

25 A. No, sir.

1 fight with those people.

2 A. Oh, yes, sir.

3 Q. I need -- from my point of view, I need
4 people that will carry it out if they think that.

5 A. Yes.

6 Q. Are you one of those people?

7 A. Yes, sir.

8 Q. Okay. The Defense is probably going to ask
9 you the opposite. They're probably going to say,
10 "Gosh, you know, if you listen to all the evidence,
11 does that mean you're always going to vote for a death
12 penalty? Can you consider a life sentence and give
13 them a life sentence, if that's what the evidence
14 calls for?"

15 A. Of course.

16 Q. And you can do that, too, can't you?

17 A. Of course.

18 Q. Of course. Well, you seem to be pretty
19 open-minded about that. Sounds like you're going to
20 wait until you hear everything.

21 Let's talk about why this is a capital
22 murder case. I -- I mentioned it a second ago about
23 it's murder plus something else, in this case, murder
24 plus robbery. And the law says if you kill somebody
25 or murder them while you're in the course of

1 Q. Even though it may be called upon -- it's an
2 awesome responsibility and it's something that -- that
3 certainly nobody wants to do or likes to do it, but if
4 it comes to it, I want to know if you can carry it
5 out?

6 A. Yes, sir.

7 Q. You see what I'm getting at? From my point
8 of view, I want to know if you don't just talk the
9 talk, but if you'll walk the walk.

10 A. Yes.

11 Q. You will see what I'm saying?

12 A. (Nods head.)

13 Q. Because it's okay because people sometimes
14 say, "Well, gosh, Mark, I believe in the death
15 penalty. It's a good law. I'm glad we have it in
16 Texas. We need to do something about crime." And
17 then I say, "Okay, well, come sit on the jury and make
18 that decision." They say, "Whoah, not me. Let
19 somebody else do it."

20 A. Of course.

21 Q. You know? You don't feel that way, though.

22 A. Well, it's a tough decision. We see a lot of
23 people -- I could see how a lot of people would be
24 afraid of having to make the decision.

25 Q. It's -- and it's okay. I'm not trying to

1 committing or attempting to commit robbery, then it's
2 capital murder. You're eligible for the death
3 penalty. Doesn't mean you're automatically going to
4 get it, it just means that's one of the two options
5 that's available.

6 Robbery, I think the Judge will give you
7 some instructions at the end of the trial, will say
8 basically taking something by force or threats of
9 force. In other words, if you just take something
10 that's theft. But if you take something and hit
11 somebody over the head with something, you know, take
12 it or you say, "I'm going to hurt you if you don't
13 give me your wallet," that would be robbery. You
14 understand that?

15 A. Yes, sir, I do.

16 Q. The law does not say it has to be a
17 "Completed robbery." Now, that sounds funny, but if
18 you say, robbery -- well, here's an example. Say
19 you're a juror on a robbery case, and a guy goes into
20 a bank to rob a bank and he goes up to the teller and
21 sticks the gun in her face, says, "Give me all your
22 money." And the teller, of course, is scared of this
23 threat and gives him all the money. And he's going
24 out of the bank with the bag of money and the police
25 get called and they catch him right there at the bank.

1 He's never gets away with it. He's still got the
 2 money. Can he come to court and say, "Hey, I'm not
 3 guilty. I -- I didn't actually finish the robbery. I
 4 didn't get away."

5 A. No.

6 Q. No. But -- that's silly, right?

7 A. Yes.

8 Q. It's kind of a trick question because people
 9 will say, "Well, gosh, you know, I'm not guilty. I
 10 didn't actually -- I didn't get away with the money.
 11 I didn't actually get to take all the money." Or it
 12 could be anything, he could be in the middle of
 13 robbing the teller and, you know, the teller's handing
 14 him the money and the police come in and stop him. He
 15 goes, "I never got any of the money." Does that mean
 16 it's not a robbery?

17 A. No. It's still a robbery.

18 Q. Of course not. Okay, it's kind of a tricky
 19 legal thing, but it's not that trickery because it
 20 makes sense. Just because a person goes in there and
 21 holds a gun on somebody and says, "Give me all your
 22 money," I mean, that's a robbery, right, when that
 23 happens. It doesn't matter if he's actually finished
 24 it or not. Do you agree with that, then?

25 A. Yes, sir.

1 decision unless I hear from him." And I have to tell
 2 them, "Well, you're not going to qualify as a juror
 3 because you have to follow the law that says if a
 4 person exercises those rights, you can't hold it
 5 against him." Would you be able to do that and not
 6 hold it against him?

7 A. Yes, sir.

8 Q. And just because he's charged by indictment,
 9 the grand jury has indicted him, does that mean he's
 10 guilty?

11 A. No, not at all.

12 Q. Not at all. The other thing is the burden of
 13 proof. In this case and every criminal case, it's
 14 beyond a reasonable doubt. Do you watch much T.V.
 15 about these crime shows or police shows or anything?

16 A. Yeah, I've seen them, seen them before, yes,
 17 sir.

18 Q. Well, they're so entertaining, but they're so
 19 inaccurate sometimes.

20 A. I can imagine how.

21 Q. I know there's this movie out there, it's an
 22 old movie, it's called, "Shadow of a Doubt," "Beyond a
 23 Shadow of a Doubt." And you had always hear that on
 24 T.V., "Well, you got to prove it beyond a shadow of a
 25 doubt." Guess what, this Judge is never going to tell

1 Q. Do you agree with the fact that just because
 2 a person is charged with a crime doesn't necessarily
 3 mean they're guilty of the crime?

4 A. Of course not.

5 Q. Okay. What does that mean? That's what we
 6 call "the presumption of innocence."

7 A. Uh-huh.

8 Q. As he sits right now -- there right now, do
 9 you understand that he is presumed innocent?

10 A. Yes.

11 Q. He doesn't start with anything. He doesn't
 12 have to prove anything. And, as the Judge said very
 13 eloquently, the State has to prove the case beyond a
 14 reasonable doubt. He has to prove nothing. He
 15 doesn't even have to testify if he doesn't want to
 16 because the Fifth Amendment guarantees that if he
 17 doesn't testify we can't hold that against him.

18 You wouldn't hold it against him, would
 19 you, if he doesn't testify?

20 A. No. That's -- that's an amendment, it's the
 21 law. You can't --

22 Q. That's exactly right, it's the law. But some
 23 people -- and, again, you know, I'm not trying to pick
 24 on anybody, but some people say, "Look, Mark, I want
 25 to hear both sides of the story, and I can't make a

1 you you have to do it that way. The Judge is going to
 2 say you have to prove it beyond a reasonable doubt.
 3 It doesn't mean beyond all doubt, any doubt, shadow of
 4 a doubt, anything like that. What it basically means
 5 is you have to have -- be sure in such a way that
 6 you -- that it's beyond a reasonable doubt. I just
 7 don't want you holding the State to a burden that
 8 would be unfair for me because there's no way I
 9 could show it to you a hundred percent, right.

10 The only way I could prove to you a
 11 hundred percent if you were a witness and you saw the
 12 the whole thing yourself. That would be impossible
 13 for me to do that --

14 A. Of course.

15 Q. -- because you wouldn't be on the jury. And
 16 beyond a reasonable doubt doesn't mean that you have
 17 to do that. All it just means is just beyond a
 18 reasonable doubt, not beyond all doubt or any doubt,
 19 because I've had some jurors come up and say, "Well,
 20 Mark, you have to prove it to me 100 percent." I say,
 21 "Well, it doesn't say a hundred percent. It says
 22 beyond a reasonable doubt." Follow me on that?

23 A. Yes, sir.

24 Q. Okay. Let me talk about the -- the format
 25 the trial goes. The Judge hit on this a little bit,

1 but I want to cover it with you. The first part of
 2 the trial, if you're selected on this jury, is guilt
 3 or innocence. The second part of the trial, if you
 4 get to that, is the punishment evidence, punishment
 5 part of the trial.

6 The first part of the trial is just
 7 basically did he do it or not, is he guilty or not of
 8 the crime? The State has to prove all the elements
 9 beyond a reasonable doubt, and if the State doesn't
 10 prove all of the elements, what does that mean?

11 A. If they don't prove all the elements, then
 12 he's I guess acquitted and innocent.

13 Q. That's right. Well, we call it actually "not
 14 guilty."

15 A. Not guilty.

16 Q. Not guilty because the State hadn't proven
 17 the case beyond a reasonable doubt. He doesn't have
 18 to prove he's innocent, but the -- the State has to
 19 prove that he's guilty. But that's a word,
 20 "Acquitted," is fine.

21 A. Okay.

22 Q. But if the State does prove the case beyond a
 23 reasonable doubt to the jury's satisfaction, what
 24 would your duty be?

25 A. To -- guilty?

1 you about where you don't know what the punishment's
 2 going to be till you know what the surrounding
 3 circumstances are. And so, you might get to hear this
 4 additional evidence, and then once you hear that part,
 5 does that mean you go back in the jury room and say,
 6 "Well, I vote for death or I vote for life"? No, it
 7 doesn't work that way. You don't just vote death or
 8 life. What you do is answer two questions. And it's
 9 how you answer those questions is what happens to the
 10 Defendant.

11 So, you've heard the evidence in the
 12 first part of the trial, you think he's guilty. The
 13 second part of the trial you get to hear additional
 14 evidence. You may get to hear additional evidence
 15 about his background, you know, good or bad. Then you
 16 go and answer two questions. They're on the board,
 17 here, and I'm going to ask you to turn around behind
 18 you and look at that first one.

19 The first one says, "Is there a
 20 probability that the Defendant would commit criminal
 21 acts of violence that would constitute a continuing
 22 threat to society?" We call that "the future
 23 dangerousness question." In other words, is he going
 24 to be a danger to us in the future, right? And you've
 25 probably heard words like "continuing threat to

1 Q. To find him guilty, right. So, if you find
 2 him guilty -- if you find him not guilty, the case is
 3 over with.

4 A. (Nods head.)

5 Q. But if you find him guilty, the jury does,
 6 then you go to the second part of the trial. And the
 7 second part of the trial you might get to hear
 8 additional evidence. Like, the first part of the
 9 trial is usually just what happened that day, you
 10 know, the surrounding circumstances of the crime,
 11 maybe before the crime, after the crime, but it's
 12 really about what happened that day, right?

13 A. Yes, sir.

14 Q. The second part of the trial, in order to
 15 help you decide what punishment he gets because,
 16 remember, it's not automatic --

17 A. Of course.

18 Q. -- you got to -- you might get to hear other
 19 stuff about his background. You might get to hear
 20 that the person has, you know, been an Eagle Scout and
 21 was on the honor roll in school. And then you might
 22 hear, well, no, he's been to prison ten times before.
 23 You see what I'm saying?

24 A. Yes.

25 Q. It's kind of like those burglary cases I told

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 1 society" before and that's kind of a catch phrase.
 2 But I want you to highlight on a couple
 3 of words on there. The first question -- part of the
 4 question says, "Is there a probability." Probability
 5 means more likely than not. There's no way, unless
 6 you have a crystal ball and can look in the future,
 7 that you know for sure what's going to happen, right?

8 A. Of course.

9 Q. And the law doesn't require me to do that.
 10 The law just says is it probable, doesn't say for sure
 11 or certainty. The second part says, "that the
 12 Defendant would commit criminal acts of violence,"
 13 which could be almost any act of violence. It doesn't
 14 necessarily mean you think he's going to kill again
 15 because some people say, "Well, I can only give the
 16 death penalty if I think he's going to murder somebody
 17 again or commit capital murder again." But the law
 18 doesn't say it has to be that much. It just says
 19 would -- if you think he's going to commit criminal
 20 acts of violence, anything like that.

21 And the last part says, "would constitute
 22 a continuing threat to society." What does society
 23 mean to you?

24 A. Like, a community or basically anywhere.
 25 Anywhere that anyone would live, go.

1 Q. Anywhere that there's other people, right?
 2 A. Of course, yes.
 3 Q. Okay. What if -- sometimes people come up to
 4 me and say, "Well, Mark, why don't you just put him --
 5 why do you seek the death penalty? Why don't you just
 6 put him in prison? Because if you put him in prison,
 7 they're locked up, they can't hurt anybody." And I
 8 always say, "Wait a minute, who else is in a prison?"
 9 A. They're all human beings. Doesn't matter if
 10 they're in prison or not.
 11 Q. That's right. There's other guards -- I
 12 mean, there's guards --
 13 A. Of course.
 14 Q. -- there's prisoners, there's people that
 15 work at the prison, like a warden and clerical people,
 16 probably maintenance people, all those kind of folks.
 17 So it's not like we put them on a desert island and
 18 they're the only human being out there, right?
 19 A. Of course not.
 20 Q. Have you ever heard of that happening, like
 21 guards getting attacked or inmates attacking other
 22 inmates or stuff like that?
 23 A. I seen shows where it happened before.
 24 Q. Yes. Well, it happens not just on -- on T.V.
 25 A. Oh, of course, I'm just saying --

1 Q. It really happens, right?
 2 A. Yes. I've never known of a case directly,
 3 but...
 4 Q. No, I know, but you -- you understand that
 5 could happen, right?
 6 A. Yes, sir, of course.
 7 Q. So when people say, "Just putting him in
 8 prison takes him away from society," that's not
 9 exactly right.
 10 A. No.
 11 Q. It sounds kind of funny, but prison is
 12 actually part of society because you're still
 13 interacting with other human beings, right?
 14 A. Uh-huh.
 15 Q. Okay. So that's how that first question's
 16 phrased. Is there a good chance, is it probable that
 17 this Defendant might commit other criminal acts of
 18 violence that would be a continuing threat to society?
 19 Is there a chance he's going to be a danger in the
 20 future?
 21 A. (Nods head.)
 22 Q. So you answer that question yes or no.
 23 A. (Nods head.)
 24 Q. Then you go to the next question. The second
 25 issue says this -- and before I talk about the whole

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 1 long explanation for it, let's talk about the word
 2 "mitigating," because that's the mitigating
 3 circumstance question. Mitigating basically means
 4 anything -- this word "mitigating," means anything
 5 that would lessen or make less severe the punishment.
 6 In other words, he did the crime, but is there any
 7 reason to give him a break and give him a life
 8 sentence, instead of the death sentence. In other
 9 words, you think he's guilty, you think he's a
 10 continuing threat to society, but hold on, before you
 11 give him the death penalty, is there any mitigating
 12 circumstances or reasons to warrant that life, rather
 13 than death be given?

14 Well, remember we were talking about not
 15 automatic, right? You have to look at everything
 16 else. Mitigating is kind of like the opposite of
 17 aggravating factors. Remember that burglary example I
 18 gave you earlier?

19 A. Uh-huh.
 20 Q. Okay? And I said, "Well," you said "every
 21 facts and circumstances are different"?

22 A. Yes.

23 Q. Say you had a burglar -- two burglary cases,
 24 one burglar here, one burglary here. Two separate
 25 cases and you're as a juror. But you hear, "Burglary,

1 that's bad, just going into somebody's house and
 2 stealing something without permission, and -- I don't
 3 like burglars. I want to punish these guys both real
 4 tough," and then you hear the facts and circumstances.
 5 In the first burglary, a guy has kicked
 6 in the back door, take -- broken the door off the
 7 hinges, gone through the house, ransacked the house,
 8 stolen money, jewelry, T.V., V.C.R., stereo, ransacked
 9 the whole house, broke a bunch of stuff, tore up a
 10 bunch of stuff, and then you find out in his past,
 11 guess what, he's been to prison five times before for
 12 burglary.

13 Now, look at the second guy. The second
 14 guy is convicted of burglary, too, because he went in
 15 somebody's house and stole something, but you hear the
 16 circumstances of that and they're a little different.
 17 What happened was, he didn't break in the house, the
 18 door was unlocked in the back and he just went into
 19 the kitchen. He went into the kitchen. He did not
 20 steal money, jewelry, T.V., V.C.R. and stereo, he went
 21 in there and stole some bread and some food to feed
 22 his kids because he had lost his job and his kids were
 23 hungry and needed some food. He could have stolen all
 24 those other things, but he didn't. All he did was
 25 take some food.

1 And then you find out about his criminal
 2 history and he has none. He's never even been
 3 arrested before. Unlike this guy who had five prior
 4 burglaries, this guy has never even had a traffic
 5 ticket before. They're both equally guilty of
 6 burglary but would you really punish them the same
 7 way?

8 A. No.

9 Q. Why not?

10 A. Well, because of the -- it's totally
 11 different cases. That guy has been, you said, five
 12 times for burglary and ransacked the place. I think
 13 the other guy was trying to -- didn't have no money,
 14 you know, trying to get it for his kids, you know?
 15 That's --

16 Q. So --

17 A. -- completely different.

18 Q. So what you've done is done two things:
 19 You've looked at the crime itself and the
 20 circumstances of the crime, and you've looked at the
 21 guys' background, and you've come up with two
 22 different answers. In the first case, those are
 23 aggravating factors. Those are bad factors and
 24 probably make your sentence go high.

25 In the second case, the sentence would

1 people will say, "Well, yeah, we should give him a
 2 break, because, you know, he was an honor roll student
 3 and he was an Eagle Scout." Some people may say, "I
 4 don't care if he's an Eagle Scout, you know, he still
 5 did this crime and he's got to pay the punishment."

6 In other words, the Judge is not going to
 7 say if you see any mitigating circumstances you
 8 automatically have to go lower, the Judge says is it
 9 enough, it there a sufficient mitigating circumstance?
 10 So you kind of have to balance them out and say,
 11 "Well, you know, he was a war hero, or maybe he was,
 12 you know, made straight A's in school or came from a
 13 broken home." And then other people may say, "Well,
 14 you know, he shot the guy 29 times, or, you know, he
 15 buried the body and kicked up the -- tore up the body
 16 afterwards, or he'd been to prison ten times before."
 17 You have to -- you have to balance all that stuff.

18 The only thing I can tell you is the
 19 Judge is going to tell you, you have to keep an open
 20 mind and consider the big picture before you give the
 21 death penalty. And it's kind of -- remember in school
 22 we always heard about checks and balances? It's kind
 23 of like a final check. Before you do it, is there any
 24 reason not to do it, is there any reason to give him a
 25 life sentence?

1 probably go lower because he didn't do anything as
 2 bad. That's what mitigating circumstance is all
 3 about, is there a reason to go lower than higher? And
 4 we all know that, you know, life is lower than -- than
 5 death, so the Judge tells you this: "You found him
 6 guilty of capital murder, you think he's a continuing
 7 threat to society, but wait a minute, jury, before you
 8 decide to give him the death penalty, stop, take into
 9 consideration all of the evidence, the circumstances
 10 of the offense," you know, what happened that day and
 11 the surrounding circumstances, "his character and his
 12 background," remember I told you, maybe he was an
 13 honor roll student or something, or maybe he's always
 14 been in trouble with the law, "and the personal moral
 15 culpability of the Defendant," is there sufficient
 16 mitigating circumstances or circumstances? Is there
 17 enough of these circumstances to warrant that a
 18 sentence of life, rather than the death sentence be
 19 imposed?

20 In other words, is there, like,
 21 extenuating or mitigating circumstances to say, "Look,
 22 you know, I'll give him a break"?

23 A. Uh-huh.

24 Q. What is a mitigating circumstance? I can't
 25 tell you. It's up to the jury to tell. Because some

1 So are you open-minded to that and
 2 consider, hey, if they bring up some evidence that
 3 says maybe he should get a life sentence, can you
 4 consider that, too?

5 A. Yes.

6 Q. And understand that just because they bring
 7 it up doesn't mean you automatically have to lower the
 8 sentence. Some people may say, "Look, I don't care if
 9 that happened, he still did this crime. It's still a
 10 bad crime. Based on all this other stuff and the big
 11 picture, I still think it outweighs those mitigating
 12 factors." Okay?

13 A. Okay.

14 Q. That's pretty much how that question works.
 15 Does that make sense to you?

16 A. Yes, it does.

17 Q. Yeah. It's kind of, you know, just to make
 18 sure everything is done right, you want to cover
 19 everything.

20 One thing the Judge may give you, too, is
 21 the law says that "Voluntary intoxication is not a
 22 defense to crime." Voluntary intoxication. That
 23 means if you get yourself drunk or high or stoned, or
 24 whatever, and you go commit a crime, that's not an
 25 excuse for the crime. I mean, I can't go get drunk,

1 go rob a bank and say, "Well, I'm not guilty of
 2 robbing the bank because I was drunk." No. As long
 3 as it's voluntary intoxication, it's not a defense to
 4 crime. Do you agree with that?

5 A. Of course, yes.

6 Q. Sure, that makes sense. And the law also
 7 says, though, that it might be a -- it could be
 8 considered a mitigating circumstance. Maybe you want
 9 to give him a break because he was drunk or stoned,
 10 maybe not. It's a possible mitigating circumstance.
 11 That's what it is, it's just a possible mitigating
 12 circumstance. A person's age can be a possible
 13 mitigating circumstance, you know, his background
 14 could be a mitigating circumstance. Almost anything
 15 could be a mitigating circumstance. Doesn't mean it's
 16 necessarily going to lower the sentence, it's got to
 17 be enough of one to lower the sentence. You got that?

18 A. Yes, sir.

19 Q. Any questions about that?

20 A. No, sir.

21 Q. Do you think that scheme is pretty good to be
 22 considered about doing these kind of cases?

23 A. I'm sorry?

24 Q. Do you think that scheme is a pretty good one
 25 to be -- so you would be careful about, you know,

1 to automatically believe what he says." And I always
 2 tell them, "Well, look, a policeman's supposed to be
 3 given the same weight as anybody else."

4 A. Yes.

5 Q. If a policeman comes up in uniform and he
 6 says, you know, the moon is made of green cheese, that
 7 doesn't mean that you have to automatically believe
 8 them, right?

9 A. No, of course not.

10 Q. Would you agree with me, though, that
 11 policemen should be treated just like everybody else?

12 A. Yes.

13 Q. I see you're still going to school, right?

14 Are you taking further schooling?

15 A. No, I've already graduated.

16 Q. Oh, you've already graduated from this
 17 course.

18 A. Yes, sir.

19 Q. I'm sorry, I've got you mixed up with
 20 somebody else. And you work on helicopters?

21 A. Yes, I build helicopters for Black Hawk and
 22 Apaches.

23 Q. Okay. Do you-all just repair them or do
 24 you-all actually build them?

25 A. We build them. Oh, well, we -- they come

1 doing these kind of cases?

2 A. Yes, sir.

3 Q. So you understand that you're going to listen
 4 to everything before you make a decision, correct, on
 5 the first part of the trial.

6 A. Yes, sir.

7 Q. And you understand that you not going to
 8 automatically do anything, right?

9 A. No.

10 Q. And you understand those facts of law that
 11 the Judge talked to you about, the parts of the law
 12 about, you know, indictment, you can't charge -- just
 13 because he's charged doesn't mean he's necessarily
 14 guilty, right?

15 A. Yes, sir.

16 Q. In fact, you even put, "Not all cases warrant
 17 the death penalty." That gives me the impression you
 18 say, "Hey, I can understand the death penalty in
 19 certain cases, but not in all cases."

20 A. Of course.

21 Q. It's up to the facts.

22 A. Every case is different.

23 Q. Now, the law also says that policemen are
 24 treated the same just like other people. Sometimes
 25 people say, "Well, you know, he's a policeman. I have

1 back from Iraq and we tear them down, then rebuild
 2 them with new parts. Overhaul.

3 Q. Okay. So it's kind of like rebuilding them
 4 from scratch, overhauling them.

5 A. Yes, sir.

6 Q. And you work on the engine part?

7 A. Yes, sir.

8 Q. What made you go into that field?

9 A. My dad worked out on the Base and they had a
 10 program when when I was in high school to where I
 11 could earn college credits while I was in high school.
 12 And while I was in college, I was getting paid to go
 13 to college. And I knew it was a good career, of
 14 course, because my dad was out there, so I decided to
 15 do it.

16 Q. Did your dad work out there for a long time?

17 A. He's been out there for about 20 years.

18 Q. It seems like everybody I know that works at
 19 CCAD has been there 20, 30 years. So it's good for a
 20 a young fellow like you to get a good job like that
 21 early in your career.

22 A. Yes, sir.

23 Q. Do you have any questions about anything
 24 we've talked about that maybe I didn't explain
 25 something very well?

1 A. No, not at this time.

2 MR. SKURKA: Okay. It was nice talking
3 to you. I appreciate you listening to me and
4 answering all my questions. I'm going to let the
5 other lawyers talk to you now.

6 VENIREPERSON NO. 38: Okay.

7 MR. SKURKA: Thank you, sir.

8 THE COURT: All right.

9 MR. GARZA: May I proceed, Your Honor?

10 THE COURT: Mr. Garza.

11 MR. GARZA: Thank you.

12 VOIR DIRE EXAMINATION

13 BY MR. GARZA:

14 Q. Good morning, Mr. Johnston.

15 A. Good morning, how are you?

16 Q. My name is Ed Garza, as I had previously
17 introduced myself back I think on the 3rd when we
18 filled out these questionnaires. And sitting next to
19 me is my Co-Counsel, Mr. Jones, --

20 A. Hello.

21 Q. -- and, of course, our client, --

22 A. Hello.

23 Q. -- John Henry Ramirez. Is there any reason,
24 sir, in your mind, that you couldn't be fair and
25 impartial to both sides in this case?

1 A. Okay.

2 Q. We, the lawyers, will talk about certain
3 legal issues to you and things of that nature. We get
4 to make an opening statement, you know, perhaps at the
5 beginning of the trial before you hear any testimony,
6 and then after you hear the testimony we get to also
7 do what are called "final arguments," okay? But,
8 under the law in Texas, whatever we say to you is not
9 evidence, okay? Whatever we say to you, okay.

10 The only evidence you'll be allowed to
11 consider will be what you hear from that witness stand
12 because it will be under oath.

13 A. Okay.

14 Q. See the difference?

15 A. Oh, okay, yes.

16 Q. Okay? So what I'm talking to you about today
17 here, or Mr. Jones or Mr. Skurka, you know, is not
18 evidence of anything, okay?

19 A. Okay.

20 Q. And, basically, when we argue the case to
21 you, we are just trying to kind of give you a synopsis
22 or a -- what we believe to be -- is going to be a road
23 map of the case, you know, what the evidence will
24 hopefully show or not show. And then in final
25 argument, we're going to dissect the evidence you've

1 A. No.

2 Q. Okay. The reason we talk to you about all
3 these concepts, you know, the guilt-innocence phase,
4 the punishment phase, these special issues and all
5 those things is because this is going to be the only
6 time we really get to talk to you.

7 A. Oh.

8 Q. Okay?

9 A. Yes, sir.

10 Q. This is the only time we get to talk to you,
11 okay?

12 A. Okay.

13 Q. One-on-one, that is --

14 A. Yes, sir.

15 Q. -- and -- and, incidentally, too, I want to
16 remind you that, as -- as a juror, if you get picked
17 in this case, you're going to be referred to sometimes
18 as the trier of the facts, okay? You're going to have
19 to decide factual issues in this case because the
20 Judge, essentially, decides all the legal issues,
21 okay?

22 A. Yes.

23 Q. Because he is a trained attorney and he's an
24 elected judge and he is the one that gets to decide
25 those matters, okay?

1 already heard and -- and argue and advocate for our
2 client on our part of the case, and, of course, the
3 State will do the same thing, okay?

4 A. Okay.

5 Q. But whatever we say to you, since we're not
6 under oath, and even though we are officers of the
7 court is not evidence for you consider, okay?

8 A. Okay.

9 Q. We're just sort of arguing things to you at
10 those phases of the trial to see if there's any
11 last-minute convincing we can possibly do, and that's
12 all.

13 A. Okay.

14 Q. You understand the reasoning on that?

15 A. Yes, sir.

16 Q. Does it make sense?

17 A. Yes, sir.

18 Q. So, essentially, the only matters that you
19 will be called upon to decide are what you hear right
20 there from that witness stand, okay?

21 A. Okay.

22 Q. And you'll have to use your common sense to
23 decide if that person testifying is telling you the
24 truth, part of the truth or none of the truth based on
25 what they're saying and what their background might

1 be, any motivation or anything like that, okay?
 2 A. Okay.
 3 Q. So, it's important, and we always ask
 4 perspective jurors not to leave their common sense in
 5 the parking lot.
 6 A. Oh, no, you can't.
 7 Q. Okay? Can you do that for us?
 8 A. Yes, sir, I will.
 9 Q. I think you can, too. I just want to discuss
 10 with you what I think you already know pretty well, is
 11 that the State of Texas has to prove this case to you
 12 beyond a reasonable doubt, okay?
 13 A. Yes.
 14 Q. Reasonable doubt is not something that is
 15 naturally defined or anything, or whatever, but we can
 16 sort of kind of give you some examples of it. And,
 17 you know, one of the ones that we've been using is
 18 when you generally say you're going to take a trip for
 19 vacation, or something, you're going to get on a
 20 plane, at that point, if you have bought your tickets
 21 through a reasonable airline, whatever, you have good
 22 reason to believe that you should be able to get to
 23 your destination.
 24 A. Yes, sir.
 25 Q. Is that correct?

1 Q. That's what we're talking about.
 2 A. Okay.
 3 Q. Okay?
 4 A. Okay.
 5 Q. You see the difference?
 6 A. Yeah, definitely.
 7 Q. All right. Now, you know like
 8 what Mr. Skurka and the Judge have aptly described to
 9 you as there's two parts to every criminal trial in
 10 Texas, there's the guilt-innocence first and then the
 11 punishment, if we have to get there. If you don't
 12 feel that the State of Texas has met their burden, and
 13 if they don't, are you going to feel bad about
 14 acquitting our client?
 15 A. I'm sorry?
 16 Q. If for some reason in this trial the State of
 17 Texas doesn't prove their case, are you going to --
 18 are you going to feel bad about acquitting our client?
 19 A. No, not at all.
 20 Q. All right. And then, of course, after that,
 21 if it does happen that they do prove their case to you
 22 beyond a reasonable doubt, we get to the punishment
 23 phase and then we get to discuss with you, and it
 24 becomes a whole new trial where the State still has
 25 the burden of proving to you beyond a reasonable doubt

1 A. Yes, sir.
 2 Q. Okay. But let me sort of change the facts a
 3 little bit so we can get to the issue of reasonable
 4 doubt. Say you're sitting in the cocktail lounge
 5 waiting for your flight to be called and you see this
 6 guy walk up in a uniform who looks somewhat like a
 7 pilot and he's carrying one of those bags behind him.
 8 Have you ever seen those guys at the airport when they
 9 show up, the pilots?
 10 A. I have not but I can imagine.
 11 Q. Okay. Then let's just pretend that, you
 12 know, he's a guy in uniform, and stuff, and whatever,
 13 and then all of a sudden he sits at the bar and starts
 14 throwing back about six or seven, eight martinis, huh?
 15 A. Oh...
 16 Q. Huh? And you're going, "Gee, I sure hope
 17 that's not the guy I'm going to fly with, you know"?
 18 A. Yes, sir.
 19 Q. And you see him leave the cocktail lounge,
 20 and then you go up the jet lane and whatever, and sure
 21 enough, you get up to your plane and he's the guy
 22 that's greeting you at the door. Are you going to
 23 have a little bit of doubt about getting on that
 24 airplane?
 25 A. Yes, definitely, I would.

1 through reasonable and competent evidence that, one,
 2 there could be a probability that the Defendant would
 3 commit criminal acts of violence that would constitute
 4 a continuing threat to society, okay?
 5 A. Okay.
 6 Q. Have you given any thought to what you would
 7 want to hear or would need to hear to convince you of
 8 our client's capacity to be a continuing threat to
 9 society?
 10 A. No, I haven't really thought about it too
 11 much. I haven't -- I really don't know anything about
 12 this case or -- basically, I'd have to hear, like, I
 13 guess just like everything, you know? You have to
 14 take everything in and then make your decision.
 15 Q. Would you want to hear about his background?
 16 A. Of course.
 17 Q. Would you want to know if he's ever been in
 18 trouble before?
 19 A. Well, yes.
 20 Q. If he has any sort of criminal history?
 21 A. Of course.
 22 Q. Okay. Or if he's, conversely, never been in
 23 trouble before?
 24 A. Of course, yes, I would want to hear about
 25 his past.

1 Q. Okay. Now, this Special Issue No. 2, I want
 2 to just kind of discuss a little bit about it and I
 3 want to ask you some questions about your
 4 understanding of these issues. And I don't mean to
 5 embarrass you or anything because there's a lot of
 6 words out there that basically are like legal words.
 7 They're --

8 A. Uh-huh.

9 Q. -- you know, these words up there come from
 10 a very -- a very prolific Supreme Court case, okay,
 11 that was decided a long time ago, okay, by the Supreme
 12 Court. And Mr. Jones and I have been lawyers for,
 13 combined, maybe about 70 years, and it's still
 14 difficult for us to figure out what some of those
 15 people up there on the Supremes are telling us, okay?
 16 We call them "the Supremes."

17 But to you, in your mind, can you tell me
 18 what a Defendant's character and background would mean
 19 to you?

20 A. Well, it -- like his character and
 21 background. It would, basically, I guess, tell me
 22 just -- I can't think of the words to put it. His
 23 background would tell me, like, where he came from and
 24 how -- how his background would influence his choices
 25 and --

1 Q. Absolutely. What about his character?

2 A. Well, I really can't say because I -- I'd
 3 have -- like, each character is different, you know?
 4 Each person has a different character. Like, it's
 5 kind of hard just to, like, generalize it, you know?

6 Q. Is -- is there anything that immediately
 7 grabs your mind about what "character" means?

8 A. What character means, like -- like, how you
 9 are and how you -- how you -- I guess, how you're
 10 presumed by other people and how you --

11 Q. How you're viewed by other people.

12 A. Yes.

13 Q. How other people regard you.

14 A. Yes.

15 Q. Isn't that true?

16 A. Yes.

17 Q. Okay. Exactly what it means. Can you -- can
 18 -- before you make up your mind one way or the other,
 19 would you be able to sit down and listen to any
 20 evidence concerning potentially our client's character
 21 and background before you decide his fate?

22 A. Yes.

23 Q. Could you do that?

24 A. Oh, yes, I could.

25 Q. You see, that's what that special issue's all

1 about because, see, if the trial goes a certain way,

2 and we don't know, --

3 A. Of course.

4 Q. -- where he gets found guilty, let's just
 5 say, and you say yes to that special issue, well, it's
 6 like a train rolling down the track, you know, at that
 7 point maybe without any brakes, --

8 A. Okay.

9 Q. -- okay? And then we're asking you, well,
 10 you know, before we either, you know, end up in a dry
 11 gulch, or wherever, with that train, can you consider
 12 these issues in possibly saying that, "Well, even
 13 though he did this and even though we think he's a
 14 threat to society, we think that there's some
 15 sufficient mitigating circumstances having to do with
 16 his character, his background and his personal moral
 17 culpability that would convince us that he does not
 18 deserve the death penalty."

19 A. Yes, sir, because it's -- I guess, I look at
 20 it like two different stages because that's the facts
 21 that they present and then that one's about his
 22 background and character, of course, so it's pretty
 23 much you have to make two different decisions on
 24 whether he's guilty. And then, of course, the
 25 mitigating or, I guess, circumstance.

1 Q. Okay. And you understand that the mitigating
 2 is kind of a -- it's not a word that we generally --
 3 or, you know, --

4 A. Yeah.

5 Q. -- the general deals with on a daily basis.
 6 We do, as lawyers, you know, --

7 A. Yes.

8 Q. -- all day long, but, even then, you know,
 9 until this case came out several years ago, we still
 10 had to grapple with the idea, well, what -- what does
 11 it really mean, what does it mean, you know, and how
 12 do we explain it to people and juries in these types
 13 of cases, you know, and will they understand expert
 14 testimony on this matters and things of that nature?
 15 And we need to be sure that -- that these things like
 16 character, background, personal moral culpability are
 17 things that you can give some effect to, okay.

18 But once again, it's up to you how you
 19 want and what effect you want to give it, --

20 A. Yes.

21 Q. -- you know, good or bad, good or bad, okay,

22 --

23 A. (Nods head.)

24 Q. -- in making your decision. Can you do that?

25 A. Yes, sir.

1 Q. Okay. And we realize and understand that
2 it's a serious responsibility.

3 A. Yes, a very --

4 Q. And it's one --

5 A. -- very much so, yes, sir.

6 Q. -- that we all have here, too.

7 A. I'm sorry?

8 Q. It's one that we all share.

9 A. Yes.

10 Q. Okay? And it's important that we try to get
11 it right.

12 A. Yes.

13 Q. Do you agree with that?

14 A. Oh, definitely.

15 MR. GARZA: Thank you, sir. I don't
16 think I have any other questions for you.

17 THE COURT: All right.

18 MR. SKURKA: Judge, I have just one quick
19 follow-up --

20 THE COURT: Okay.

21 MR. SKURKA: -- if I might.

22 THE COURT: Okay. Okay.

23 VOIR DIRE EXAMINATION

24 BY MR. SKURKA:

25 Q. On one of the questionnaire questions it

1 A. Yes.

2 Q. It's kind of a wordy question but there's an
3 example that we used to use in Houston years ago on
4 Halloween night. This man had taken an insurance
5 policy out on his kid and he fed his own kid poison
6 Halloween candy and killed him. That kid was -- that
7 guy was like a good member of the community. Nobody
8 ever -- he had never had a traffic ticket, never got
9 in trouble before, but after that, they called him
10 "The Candy Man." And he was given the death sentence
11 or life sentence, the highest sentence he could get,
12 even though he was a first-time offender, he had no
13 priors.

14 You understand because of the
15 circumstances of that case the jury could decide to
16 give him the maximum sentence even though he hadn't
17 been to prison before because of the circumstance of
18 the case?

19 A. Yes.

20 Q. That's all I wanted to remind you, you don't
21 have to have a person that's been to prison ten times
22 before. It could be any of the surrounding
23 circumstances. Remember that question said look at
24 all of the evidence, including the case itself.

25 A. Yes.

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1 says, "The law in Texas says a person convicted of
2 capital murder may receive the death penalty solely
3 because of the facts and circumstances of the crime,
4 even if the person has committed no other previous
5 crimes. Do you agree with this law?" You put, "Yes."

6 A. I'm sorry?

7 Q. Okay. Let me read it, again.

8 A. Okay.

9 Q. One of the question in the questionnaire
10 said, "The law in Texas says that a person convicted
11 of capital murder may receive the death penalty solely
12 because of the facts and circumstances of the crime,
13 even if the person has committed no other previous
14 crimes. Do you agree with this law? Yes or no?" And
15 you put, "Yes."

16 A. Well --

17 Q. And that's fine to say that because the law
18 says -- remember, I was giving you those examples of
19 person being convicted five times before and a person
20 who's never been to prison before? You do not have to
21 only give the death penalty if the person has been
22 convicted before.

23 A. Correct.

24 Q. It can be just on the facts and circumstances
25 of that case. You understand that?

1 Q. Can you do that?

2 A. Yes, I will.

3 MR. SKURKA: Okay, thank you. That's all
4 I have, Judge.

5 THE COURT: All right.

6 MR. GARZA: No more questions.

7 THE COURT: Why don't you wait in the
8 jury room, Mr. Johnston, for just a second. I'm going
9 to discuss with the lawyers.

10 VENIREPERSON NO. 38: Okay.
11 (Venireperson exits courtroom.)

12 MR. SKURKA: Judge, on the record,
13 State will accept this juror.

14 MR. GARZA: We will, also.

15 THE COURT: All right. This Juror No. 5.
16 Let's bring him in.

17 (Venireperson enters courtroom.)

18 THE COURT: All right, Mr. Johnston,
19 you are on the jury, okay?

20 VENIREPERSON NO. 38: Okay.

21 THE COURT: Now, here's the deal, I think
22 I've already told you, and -- and I don't want you
23 watching the local news or reading the local paper,
24 okay? I just want you to get the facts on this case
25 from courtroom, okay, what comes through that witness

1 chair and the exhibits that are admitted into
2 evidence, all right?

3 VENIREPERSON NO. 38: Yes, sir.

4 THE COURT: I don't want you talking to
5 anybody about this case.

6 VENIREPERSON NO. 38: Okay.

7 THE COURT: Somebody tries say, "No, no.
8 Can't talk to you. Judge told me I can't talk about
9 the facts of the case at all until the case is over
10 with," okay?

11 VENIREPERSON NO. 38: Yes, sir.

12 THE COURT: Now, I expect we're going to
13 start this trial on December the 1st. It may -- it
14 will take that week for sure. It may spill into the
15 next week, so you might want to let your employer
16 know.

17 VENIREPERSON NO. 38: Okay.

18 THE COURT: And I think it will take
19 those two weeks, all right?

20 VENIREPERSON NO. 38: Okay.

21 THE COURT: All right. Thank you very
22 much for coming down and we'll be keeping in touch.
23 We'll let you know if things change.

24 VENIREPERSON NO. 38: Okay. So you --

25 THE COURT: We'll call you and let you

1 here. We'll ask Frank.

2 MR. SKURKA: Did we put 39 on the record?

3 THE COURT: All right. Let's go off the
4 record.

5 (Off-the-record discussion.)

6 THE COURT: All right. So we agreed on
7 Gerald Rogen, correct?

8 MR. SKURKA: Yes, Your Honor.

9 THE COURT: All right, Gerald Rogen is
10 gone by agreement.

11 MR. JONES: What was his number?

12 THE COURT: His number was 41. You
13 missed the story about the -- being chased at the
14 Republican --

15 MR. SKURKA: That was a pretty good
16 story.

17 THE COURT: Okay. Then, I guess, the
18 next person is Reid Baucom?

19 MR. SKURKA: 44?

20 MR. GARZA: Yes.

21 THE COURT: Are they here? Bring him in.

22 THE BAILIFF: Okay.

23 (Venireperson enters courtroom.)

24 THE COURT: You are Mr. Baucom?

25 VENIREPERSON NO. 44: Yes, sir.

1 know when to come down here, but I'm just telling you
2 that's tentatively what it's looking like, okay?

3 VENIREPERSON NO. 38: Okay.

4 THE COURT: Okay. Thank you very much.

5 VENIREPERSON NO. 38: Thank you.

6 THE COURT: If you need work excuse,
7 bailiff can get it for you.

8 VENIREPERSON NO. 38: All right. Thank
9 you.

10 (Venireperson exits courtroom.)

11 THE COURT: All right. Let's take a
12 little break, gentlemen.

13 (Short recess.)

14 MR. SKURKA: I think we have an
15 agreement.

16 THE COURT: On who?

17 MR. GARZA: On Juror 41, Judge, we're
18 going to go ahead and mutually agree to excuse him.

19 MR. SKURKA: That's correct, Judge. The
20 State agrees to excuse No. 41, also.

21 THE COURT: Okay.

22 MR. GARZA: I -- you know, we can see
23 that there's probably some occupational bias on that
24 matter.

25 THE COURT: Okay. Well, I wonder if he's

1 VENIREPERSON NO. 44,

2 REID BROWNING BAUCOM,

3 VOIR DIRE EXAMINATION

4 BY THE COURT:

5 Q. All right, Mr. Baucom, we're going to talk to
6 you about some things. Obviously, we're looking to
7 pick a jury, okay, and you know that. We need to talk
8 to you about two things. We're looking for people
9 that can keep an open mind, okay, and people that can
10 follow the law, okay.

11 So let's begin with keep an open mind.

12 Let me get to your questionnaire here. Do you think
13 that you can keep an open mind in this case?

14 A. I think so.

15 Q. Okay. Because some people say, "Well, you
16 know, I just can't, or maybe I've seen something in
17 the news and I'm already leaning one way or the other
18 because of that," or for whatever reason. We just
19 want to make sure that you can keep an open mind. And
20 if you can't it's okay, but we do need to know.

21 A. Right. I think I can.

22 Q. Okay. Okay. All right, next thing. This is
23 a criminal case, obviously. Let's see here. You have
24 never been on a criminal jury before.

25 A. No, sir.

1 Q. Okay. Well, we want to talk to you a little
 2 bit about the law in criminal cases. Some of it you
 3 probably already know. But, in any event, in every
 4 criminal case in the State of Texas, the burden is on
 5 the State of Texas to prove the charges, okay? They
 6 bring the charges, but the law says, "That's fine if
 7 you bring the charges, but you got to -- you bring
 8 them, you got to prove them." And the State just
 9 doesn't get to say that person's guilty and then it's
 10 so. They got to prove them to -- to the people, to
 11 the jury, okay? You got any problem with that?

12 A. No, sir, I don't.

13 Q. Okay. You can follow that law. Okay, then
 14 the next thing is the burden of proof is beyond a
 15 reasonable doubt. You've probably heard that before,
 16 beyond a reasonable doubt. And that's their burden,
 17 okay, it's on the State. And it's the highest burden
 18 that we have in the law, but it -- it's not defined.

19 What it isn't, it's not beyond all doubt
 20 or beyond a shadow of a doubt. It's what it is,
 21 beyond a reasonable doubt. And the lawyers will
 22 probably give you some examples of what they -- to
 23 illustrate what they think it means, okay? Could you
 24 hold the State to that burden?

25 A. Yes, sir.

1 not even, okay? They've got a burden and they have to
 2 prove it. And, as such, they don't have -- the burden
 3 never shifts over here. They don't have to present
 4 evidence.

5 As part of that, Defendant doesn't have
 6 to testify under the law. Now, it's -- it's beyond
 7 just the law, it's in the Constitution. Defendant
 8 doesn't (sic) have a right to testify, and -- and it's
 9 all -- you know, because they don't have burden of
 10 proof.

11 Now, I -- I submit there's lots of
 12 reasons why a person may not want to testify. Maybe
 13 his lawyers advise him not to testify because they
 14 don't think they've proven their case, okay? Maybe --
 15 maybe the Defendant gets very stressed and just
 16 can't -- he stutters when he gets on the stand. I
 17 mean, there's a lot of reasons, okay? But the bottom
 18 line, Mr. Baucom, is that I need to know from you
 19 whether you can follow that law or whether you would
 20 hold it against him if he -- if he didn't testify.
 21 Either way is okay, but we need to know.

22 A. Yeah, I can understand why he wouldn't want
 23 to testify. I don't think I could do it, either. I
 24 understand that. That's reasonable.

25 Q. Okay. But would you follow that law and

1 Q. Okay. Now, as part of the fact that the
 2 State's got the burden of proof, the law says if the
 3 State's got the burden of proof, well, then, everyone
 4 is presumed to be innocent until they can prove
 5 otherwise, okay? In other words, we presume everyone
 6 to be innocent until evidence is brought that can
 7 change that presumption. You follow me?

8 A. Yes, sir.

9 Q. Okay. And in this case the Defendant here,
 10 Mr. Ramirez here, is presumed by law to be innocent,
 11 unless and until if they can prove otherwise. You
 12 follow me?

13 A. Yes, sir.

14 Q. Is that -- you could follow that?

15 A. Yes, sir.

16 Q. And presume him to be innocent?

17 A. Yes, sir.

18 Q. Okay. Now, also as part of all that, since
 19 the State has the burden of proof, the Defense doesn't
 20 have to do anything, they don't have to present
 21 evidence. Now, some people say, "Well, you know what,
 22 I like to hear both sides of the story, and -- before
 23 I can make a decision." Well, it doesn't really work
 24 like that, okay? It doesn't work like that because
 25 they've got the burden of proof. It's doesn't -- it's

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 1 not -- see, it's -- it's not that -- that they can't
 2 make him testify, it's more than that. If you're
 3 selected on the jury, you can't go back in the jury
 4 room and go, "Okay, let's see, this is what the State
 5 presented. Defense didn't present anything, so I'm
 6 going to give State more points because he didn't
 7 testify. He didn't tell me his side of the story,
 8 therefore, that hurts him. I'm going to put some more
 9 over here on the State's side." You can't do that.
 10 And, if you would do that, that's okay, but we need to
 11 know that, okay?

12 A. Yes.

13 Q. Because that's really not -- that's not
 14 really following the law. I need to know from you
 15 whether you would hold it against him or you could
 16 follow the law and not hold that against him.

17 A. I believe I could follow the law there.

18 Q. Okay. You wouldn't hold it against him?

19 A. No. I can understand that.

20 Q. Okay. All right. Now, let's talk about the
 21 charge then. The charge is capital murder. And, as
 22 we've been going through this process, I -- and I've
 23 been explaining to the different potential jurors
 24 about the situation, I talk about "plain murder." And
 25 I hate that term but I haven't come up with a better

1 one, all right? "Plain murder." What's plain murder?
 2 Well, it's the intentional taking of another person's
 3 life. That's plain murder, all right? It's not
 4 called "plain murder," we just -- I'm saying that to
 5 differentiate it from capital murder.

6 The legislature says that there are
 7 certain types of murders that are capital, that is,
 8 the death penalty is a possibility. Just taking
 9 someone's life is not necessarily a capital murder,
 10 okay? Some people think that. "You take a life,
 11 well, then maybe the State could take yours," but it's
 12 not like that.

13 Capital murder is murder plus, okay,
 14 murder plus something else, plus a special
 15 circumstance. And there's a laundry list that the --
 16 that the legislature has given us. In this case,
 17 what -- what the State has alleged is that this
 18 Defendant committed a murder while in the course of or
 19 attempting to commit a robbery, same time, okay? So
 20 they got -- they put -- I mean, two serious crimes
 21 together and the two serious crimes together make the
 22 capital murder. You follow me?

23 A. Yes, sir.

24 Q. Okay. So, we got robbery, and of which, of
 25 course, is the forcible taking of something from

1 guilt or innocence phase. In other words, the
 2 beginning of the trial would go some like this, the
 3 State would try to prove to you as the jury their case
 4 beyond a reasonable doubt through evidence, okay? And
 5 the Defense, they might present evidence, they might
 6 not. They might just -- they might just use -- choose
 7 to cross-examine the State's witnesses and test their
 8 evidence that way, okay.

9 Then you'll hear closing arguments. I'll
 10 read to you the Charge, which is a packet of law that
 11 you get. Sort of -- sort of like an instruction
 12 manual for the jury and you get to go back there and
 13 deliberate, okay? You follow me?

14 A. Uh-huh.

15 Q. Then you determine whether the State's proven
 16 their case beyond a reasonable doubt, guilty, not
 17 guilty. If the jury comes back not guilty, the case
 18 is over with, okay?

19 A. (Nods head.)

20 Q. If the jury finds the Defendant guilty of
 21 capital murder, we go on to the second phase of the
 22 trial, which is the punishment phase. Now, normally
 23 in criminal cases, other than a capital murder, there
 24 is a punishment range, okay? Let's say, 5 years to 99
 25 years or life, okay? And then the jury would go back

1 another. Not just theft, robbery. Okay? You
 2 forcibly take or threaten to take something from
 3 another, and they put the two together.

4 Now, that gives us capital murder.
 5 And -- and the law says that for someone who's found
 6 guilty of capital murder, the State has to prove all
 7 of the elements. That is, they have to prove the
 8 robbery and the murder, all of it. And they don't get
 9 to prove seven out of eight or eight out of nine,
 10 whatever the number of elements there are. They have
 11 to prove it all.

12 Would you hold the State to that burden
 13 and require them to prove all of the elements before
 14 you found the Defendant guilty of capital murder?

15 A. Yes, sir.

16 Q. Okay. Now -- okay. Now, you've never been
 17 on a criminal jury before but let me explain to you
 18 how it works. A lot of this stuff that we just talked
 19 about, you know, a lot of jurors know that because
 20 they've read it or maybe they remember it from school
 21 or maybe they even saw it on T.V., or whatever. One
 22 thing that a lot of jurors don't know is that our
 23 system in -- in Texas, the jury system, is bifurcated.

24 And what does that mean? Well, that
 25 means you got a first part of the trial, which is the

1 there on the punishment part and they'd say, "Well,
 2 you know, based upon all the facts and circumstances,
 3 we think it's X," you know, they decide. You don't do
 4 that in a capital murder case, all right?

5 I will tell you, there's two
 6 possibilities in punishment if a Defendant is found
 7 guilty of capital murder. And, of course, we've
 8 talked about one, that's death, death penalty. The
 9 other is life in prison. There's two possibilities.
 10 But you don't say life or death, that's not what the
 11 jury does. The jury answers questions, okay, and then
 12 based upon the answers to those questions determine
 13 what the sentence is.

14 And if you'll look over here, over your
 15 shoulder here, here's the first question, "Is there a
 16 probability the Defendant would commit criminal acts
 17 of violence that would constitute a continuing threat
 18 to society?" That's Question 1, and the jury would
 19 answer yes or no, okay?

20 After they answer that question, then
 21 they would -- if you turn around in your right
 22 shoulder there is Special Issue No. 2, the second
 23 question. "After taking into consideration all of the
 24 evidence, including the circumstances of the offense,"
 25 that's the first part of the trial, the guilt or

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1 innocence part, okay, "the Defendant's character and
 2 background and the personal moral culpability of the
 3 Defendant, is there a sufficient mitigating
 4 circumstance or circumstances to warrant a sentence of
 5 life imprisonment, rather than the death sentence be
 6 imposed?" You understand?

7 A. Yes.

8 Q. In other words, first part of trial, guilt or
 9 innocence, you just hear about what happened that day.
 10 You know, that's what they're going to try and prove.

11 A. Right.

12 Q. Okay? And I don't know if they can prove it
 13 or not, okay? Maybe -- maybe the Defendant will be
 14 found not guilty. Maybe State can't prove its case.
 15 But if they find -- if the jury finds the Defendant
 16 guilty, then you answer these questions. And this
 17 part talks about not just what happened that day, but
 18 about everything. Maybe you'll hear about the
 19 Defendant's background, what kind of guy he was. Was
 20 he a good guy, was he a bad guy? You know, did he
 21 help others? You know, is he a bad guy his whole
 22 life, bad criminal history, good criminal history, you
 23 know? That kind of thing.

24 In other words, you have to take
 25 everything, everything that's presented to you in

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1 say, "You know, Judge, I can't -- I can't answer those
 2 questions because I can't participate in a process
 3 that can lead to someone's death, potentially." Okay.

4 And other people say, "Well, you know
 5 what, if we find him guilty of capital murder, I'm not
 6 -- I'm not going through this process. He gets
 7 automatic death as far as I'm concerned," all right?
 8 But if -- if either one of those is you, that's fine,
 9 okay, but we need to know whether you can take the
 10 oath to answers these true -- these two questions
 11 truthfully or not. Could you do that?

12 A. Yes, I believe I could do that

13 THE COURT: Okay. All right. Well,
 14 then, I'm going to turn the floor over to Mr. Skurka.

15 VOIR DIRE EXAMINATION

16 BY MR. SKURKA:

17 Q. Hello, Mr. Baucom, how are you this morning?

18 A. I'm pretty well.

19 Q. Good. Today we're going to talk about some
 20 things, and follow up some stuff that happened that we
 21 talked about the other day in court that first day we
 22 had all those people in there. I'm going to start off
 23 by telling you there's no right or wrong
 24 answers to anything you say. We just want to know how
 25 you feel, to see if you're qualified as a juror, okay?

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1 making this determination, not just the case,
 2 everything that's presented to you, okay?

3 A. (Nods head.)

4 Q. You follow me?

5 A. Yes.

6 Q. And then the jury would answer yes or no to
 7 that question. All right. The beginning of the case,
 8 I am going to ask the jurors that are selected to
 9 raise their right hand and I will -- I will ask them
 10 to take an oath. And that oath is, "Do you solemnly
 11 swear that you will render a true verdict based upon
 12 the law and the evidence presented to you," and they
 13 will say yes, okay.

14 I need to know if you can take that oath,
 15 okay? First of all, I need to take -- know that you
 16 can take the oath to -- based upon the law and the
 17 evidence, to hinder a true verdict, guilty or not
 18 guilty, based upon the evidence in this case. Can you
 19 do that?

20 A. Yes, sir.

21 Q. Okay. And the second part I need to know, if
 22 we do get to the second part and we get to these two
 23 questions, I'm going to -- I'm going to ask if you can
 24 do that. And -- and let me stop you before you answer
 25 because what sometimes people tell me is this, they

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1 A. Yes, sir.

2 Q. I don't want you to answer the question such
 3 a way you think the Judge wants to hear it or the
 4 Defense wants to hear it or I want to hear it. You
 5 just answer it the best way you know how and we'll
 6 deal with that, okay?

7 A. Yes, sir.

8 Q. I see that you're -- you used to work at
 9 Reynolds for some time?

10 A. Yes.

11 Q. How long have you been retired or -- from
 12 Reynolds?

13 A. Just about two years.

14 Q. Two years. What do you like to do with
 15 yourself nowadays?

16 A. I mess around with computers. And then I go
 17 around town passing out Gospel tracts --

18 Q. Okay.

19 A. -- just a couple of days a week.

20 Q. For the church you go to?

21 A. No, no, no. I wrote it myself. It has
 22 nothing to do with any church.

23 Q. Is that right? You wrote your own Gospel
 24 tract?

25 A. That's exactly right.

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1	Q. Tell me what motivated you to do that.		that are involved. But as far as the death penalty,
2	A. Well, the things that the Lord has done for		I'm for the death penalty, but according to the
3	me in my life, and I just wrote that out and give that		circumstances of the -- of the case.
4	out to share with people. And I don't advertise any		Q. So what you're saying is you support it as
5	particular church or denomination or anything.		the law, the death penalty; correct?
6	Q. Uh-huh.		A. Yes.
7	A. There's no phone number, address or name on		Q. But you're not just going to give it out
8	that thing I pass out. I just pass it out free. It's		willy-nilly. You're going to make sure it's
9	one thing that you get in a whole day's time that's		appropriate in that kind of case?
10	free. Everything else there's some kind of cost, I		A. Heaven -- yes, sir. That's -- it's a very
11	don't care what they say.		important decision. That's...
12	Q. Well, that's very inspirational, sir. That's		Q. I don't want to put words in your mouth. You
13	nice to do that. And it's good because,		tell us.
14	unfortunately, sometimes with churches people have		A. Well, I believe that is one of the most
15	their own agenda and stuff. And it sounds to me like		important decisions that a person will make in a -- in
16	you're across-the-board thanking the Lord for what		a pretty good considerable time because that's a --
17	you've been given and trying to share that, huh?		that's a heavy decision that needs to be weighed
18	A. Right. I guess, so, yeah, if I understand		carefully.
19	your question. I...		Q. And I think everybody agrees with you because
20	Q. I understand. Well, I'm just -- because		you can see we're pretty serious in here about it and
21	sometimes people are retired and they just -- I just		you saw how no one takes it lightly. But I'll be
22	like to hear what kind of activities they like to do		honest with you, I told you the very first day when
23	and stuff, and I'm just kind of curious what you came		you were called into jury duty, I told all those
24	from.		people in that room, "The reason you're here is
25	Now, you are belonging to the Bay Area		because the State is seeking the death penalty in this
	97		99
1	Fellowship Church.		case." And, you know, I'm -- I don't make bones about
2	A. Yes.		it, you know, that's -- that's what we're seeking.
3	Q. Okay.		And I'm -- I'm looking to see if I have a person in
4	A. Well, I don't really belong, I just attend.		you and the other jurors that can follow through on
5	Q. You just go to that?		that, if they decide it is appropriate in a certain
6	A. Right, I just go there.		case. Are you that kind of person?
7	Q. Tell me this, do they have --		A. Absolutely.
8	A. And I don't advertise that.		Q. And that's what I want to say is because some
9	Q. Oh, I understand.		-- and, you know, some people are for the death
10	A. Yeah.		penalty, some people are against the death penalty,
11	Q. I'm just kind of curious what their position		some people don't know. It doesn't matter to me what
12	toward the death penalty is, if they have anything		-- what they feel. I'm never going to tell somebody,
13	stated like that, or do they even talk about it?		"You can't think that way," or, "You can't feel that
14	A. They don't talk about it.		way." But put yourself in my perspective. I need to
15	Q. So you don't know if there's any one way or		make sure I have somebody who if I present the case
16	the other they are?		and they find him guilty under the proper evidence,
17	A. I doubt if they're one way or the other. I		and if there's evidence that shows that he should get
18	think it's -- I think it's -- each case is different.		the death penalty, can they follow through with it?
19	I think that's, you know...		And -- because some people say, "Hey, Mark, I'm for
20	Q. I understand, and that's fine. I'm just kind		the death penalty. It's a good law. I'm glad we have
21	of curious how you feel about it in -- in particular.		it. Crime is out of hand. We need to do something,
22	If I came up to you on the street and said, "Hey, how		but, please, don't make me be the one to do that
23	do you feel about the death penalty," how would you		answer, to make that decision."
24	answer that?		Are you that kind of person that you're
25	A. I'd say I'd have to look at the circumstances		worried about making that kind of decision?

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1	A. No.	1	to weigh it just as fairly as I possibly could.
2	Q. Okay. And -- and what it sounds to me like	2	Q. Well, why did you think at first that you
3	you're going to want to wait till you hear everything	3	wouldn't be qualified, then?
4	and you're not going to pull the trigger too early on	4	A. Well, that's just something -- I've worked
5	something till you want to make sure everything's	5	in -- for corporations all my life and just really not
6	done.	6	had a lot -- not been very high up the ladder. And
7	A. I wouldn't want to do that on -- I wouldn't	7	this -- a person is pretty high up the ladder on this
8	want that done to me and I wouldn't want to do that to	8	case.
9	somebody else.	9	Q. Well, let me tell you what I think everybody
10	Q. That is a very good answer because that's	10	will tell you. It doesn't matter about jurors.
11	what we're looking for, jurors who want somebody as	11	Jurors are there to be factfinders. You could be the
12	fair as they would be to judge a person if they were	12	president of a company, a doctor, a lawyer, a C.E.O.,
13	on trial. You can be that person, right?	13	doesn't matter. Anybody --
14	A. Absolutely.	14	A. Right.
15	Q. Okay. Now, the reason we talk about the	15	Q. -- that -- and that's what need on jurors, a
16	death penalty is because that's a first -- that's one	16	cross-section of the community. We have housewives,
17	of the major issues in this case. When you heard it	17	manual laborers, white-collar workers, blue-collar
18	was that kind of case -- I don't know if you've ever	18	workers. It doesn't matter. That's what we want to
19	been called for jury duty before, but, you know,	19	have on a jury. We don't want to have, you know, 12
20	sometimes on Monday, people come in there and they	20	elderly white men on the jury. We want women, we want
21	think, "Oh, I'm going to get a trespassing case or a	21	diversity, we want Blacks, Hispanics and everything,
22	shoplifting case or a D.W.I.", and then they find out,	22	and from all walks of life. And, you know, you come
23	"Folks, this is a capital murder case. You may have	23	from one walk of life, but the person next to you on
24	to make that decision."	24	the jury may be somebody completely opposite from you.
25	When you heard that from Judge Galvan a	25	Maybe, you know, years younger to you, a different
	101		103
1	couple of weeks ago when we were in that big room,	1	race, a difficult sex. Does that matter? Of course
2	what did you think?	2	not. That's -- that's why we want to have people like
3	A. I was just a little bit surprised.	3	that.
4	Q. A lot --	4	So when you said you felt like you may
5	A. Of course, I had no idea what I was there	5	not be qualified, you just thought because you
6	for.	6	didn't -- you hadn't really done -- I'm not sure I
7	Q. And nobody did.	7	understand what you meant.
8	A. No.	8	A. Well, that's just a little bit of weighty
9	Q. And that's exactly right. You come in there,	9	decision. And anytime there's a weighty decision, the
10	and -- and, in fact, most of the time if you're on	10	ordinary person would like to just shove it off on
11	jury duty, you never know what it is. It's kind of	11	somebody else, but sometimes -- I found out that
12	the luck of the draw. But, I don't know, I'm	12	sometimes you, yourself, are the qualified one.
13	wondering if your first reaction was, you know, after	13	Q. Uh-huh. Some people -- on that first day, I
14	your surprise, what other reaction would you have --	14	saw people out in the audience because I watch their
15	did you have?	15	reaction because I kind of want to see what they look
16	A. Well, right at first I thought I'm not	16	like, and some of them, I go -- they go (indicating)
17	qualified to be on this type of jury because that is a	17	and some of them go, "Oh, my gosh, I can't believe I'm
18	heavy, very weighty decision. And then I -- then I	18	on this case," and they start having like a --
19	thought about it and I thought, "Wait a minute, I'm	19	freaking out.
20	actually more qualified than most people."	20	And then some people say, "Gosh, that is
21	Q. Explain that, please.	21	a surprise, but I better listen a little closer and
22	A. Well, I believe --	22	pay attention to what the Judge is saying because this
23	Q. Both of those statements.	23	is a pretty serious case." Is that kind of how you
24	A. I believe that I would honestly look at the	24	felt?
25	those -- at the case itself and -- and weigh it -- try	25	A. That's how I felt.

<p style="text-align: right;">104</p> <p>1 Q. Okay. Because you see different types. And 2 I'm not saying anybody's right or wrong, but some 3 people will tell us, "You know, Mark, put me on a 4 D.W.I. case, put me on a shoplifting case. I can do 5 that, but I don't want to handle that big, awesome 6 responsibility." So how do you feel about handling 7 that awesome responsibility?</p> <p>8 A. I believe I could handle it.</p> <p>9 Q. Okay. You know, we're talking about stuff -- 10 you know, we always talk about stuff in general. But 11 in here we're more specific. We're not talking about 12 the death penalty in some other county or state or 13 some guy you've seen before. That's him, right there. 14 Take a look at him. That's John Henry Ramirez. You 15 understand that I told you the first day there's going 16 to be a time to come in this trial if you're selected 17 on this jury that the State is going to come up and 18 say that, based on the evidence and the circumstances 19 of this case, you should answer the questions in such 20 a way that that man gets executed.</p> <p>21 I want you to look at him and tell me, 22 can you do that if you think the evidence qualifies 23 him for that?</p> <p>24 A. Yeah, if it -- if the evidence qualifies him, 25 I believe I could.</p>	<p style="text-align: right;">106</p> <p>1 in the middle about what you're going to do on guilt 2 -- I'm sorry, on punishment or death penalty or life 3 sentence.</p> <p>4 But it's clear that you have to consider 5 him presumed innocent at this point because you 6 haven't heard any evidence; correct?</p> <p>7 A. That's right, I haven't heard a thing.</p> <p>8 Q. That's right. So if you had to vote for it 9 right now, you -- you'd have to vote not guilty 10 because you haven't heard anything.</p> <p>11 A. I'm absolutely not qualified at this moment.</p> <p>12 Q. That's right. No, I hear you. And talking 13 about decisions, a big decision, my gosh, it seems 14 like you've lived a long, full life, and you've raised 15 four kids, or so, and been married to the same woman 16 for 29 years, you've probably made a few hard 17 decisions in your life.</p> <p>18 A. Yes, sir.</p> <p>19 Q. And -- and part of being on the jury is 20 making those decisions because that's how our system 21 works, right? I mean, people complain about the 22 American Justice System, but, you know, show me a 23 better one, you know? There's -- there's -- sometimes 24 mistakes happen, but we -- everybody tries to do the 25 best. And the most important thing to me about the</p>
<p style="text-align: right;">105</p> <p>1 Q. Okay. Any hesitation about that?</p> <p>2 A. No.</p> <p>3 Q. Okay. The other part I want to ask you is 4 the opposite. Can you look at him and say, "Look, I 5 know you're innocent, and you're presumed innocent 6 because the Judge has said that the State has to prove 7 the case beyond a reasonable doubt." You believe 8 that, too, right?</p> <p>9 A. Yeah, I believe that, too.</p> <p>10 Q. And if the evidence is such a way that you 11 think that maybe the question should be answered in 12 such you get a life sentence, can you vote for that, 13 also?</p> <p>14 A. Yeah.</p> <p>15 Q. You -- so what you're telling me is that 16 you're -- you've got no preconceived notions that -- 17 which way you're going to vote right now; correct?</p> <p>18 A. No. I --</p> <p>19 Q. And that's --</p> <p>20 A. -- don't have any idea.</p> <p>21 Q. That was -- that's the perfect answer because 22 you don't want to be that. And you see what -- we're 23 talking about qualifying jurors is, you don't want to 24 be leaning too far to the State, you don't want to be 25 leaning too far to the Defense. You should be right</p>	<p style="text-align: right;">107</p> <p>1 death penalty is the State can't decide on the death 2 penalty. This Judge can't decide who gets the death 3 penalty. Our legislature has entrusted it with the 4 people, with the 12 people on the jury. So, it means 5 the people decide. Isn't that a fair statement to 6 have it that way?</p> <p>7 A. That -- that's the fairest thing in the 8 world, I believe.</p> <p>9 Q. Right. You don't want to have some dictator 10 saying, "Okay, he gets put to death or she doesn't," 11 you know? You don't want to do that. So we rest that 12 in the power of the -- of the people, which is 13 probably the best way to do it.</p> <p>14 Now you understand, too, that sometimes 15 people looked at -- at him when he first -- when he 16 came in the room a couple of weeks ago, and they said, 17 "Man, that's the guy? He looks so young. He doesn't 18 look like he could hurt a fly." And some people say, 19 -- well, you know, I think when people have criminal 20 jury cases they always expect to see Charles Manson 21 sitting there, you know, some bad-looking guy and then 22 they see maybe he doesn't look that bad.</p> <p>23 Would you agree with me that you 24 shouldn't make a decision as a juror based on how 25 somebody looks, that you should make a decision on the</p>

1 way -- what they did?

2 A. Absolutely. You can't tell by looking.

3 Q. Okay. You can't judge a book by its cover,

4 right?

5 A. Absolutely not.

6 Q. But some people say -- they'll say, "Oh, he's

7 so handsome," or "She's so pretty," or something like

8 that. That's not any reason to make a decision, is

9 it?

10 A. Absolutely not.

11 Q. Okay. And what about people being young or

12 not? Because sometimes people say, "Well, you know,

13 he's so young, you know. He's just not very

14 experienced or something." The law says in Texas the

15 State can -- you cannot execute a person under 18

16 years of age. I mean, if it's a juvenile, if he's 16,

17 17 years old, and he does the worst crime imaginable,

18 you can't get the death penalty because the law says

19 you can't. But anything over 18 is -- I guess, the

20 State recognizes that those people have the mentality,

21 are grown up enough to know the difference between

22 right and wrong and the consequences of the action.

23 Do you agree with that?

24 A. I agree.

25 Q. So it doesn't really matter if you're 21, 31,

1 41, 51, you're responsible as long as you're over 18;

2 correct?

3 A. Absolutely.

4 Q. Sure. Now, the reason this is a capital

5 murder case and -- and that he could face the death

6 penalty is that this is murder plus robbery, and the

7 Judge told you what robbery was. It's basically a

8 forced theft. You steal something, but you hurt

9 somebody while doing did it or threaten to hurt

10 somebody while doing it. The thing I need to tell you

11 is it says, "in the course of committing or attempting

12 to commit robbery."

13 In other words, it doesn't have to be a

14 necessarily completed robbery, it could be in the

15 course of committing robbery. Say, for example,

16 somebody's robbing a bank and they get the bag of

17 money and they're heading out the door and they get

18 caught by the police right out the door. Can he go to

19 court and say, "Hey, I'm not guilty. I didn't get

20 away with it so I didn't really take the money?"

21 Well, that's not going to work.

22 The robbery takes place as soon as you

23 put -- hurt somebody or put them in fear of their

24 circumstances. Doesn't really matter how much you got

25 away with or if you got away with anything. That's

1 still robbery. You follow me on that?

2 A. Yes, sir, I follow that.

3 Q. Okay. And in this case there's two parts to

4 the trial. The first part is the guilt or innocence

5 phase, which is basically did he do it or not, and the

6 second phase is the punishment phase. In the first

7 part of the trial you generally hear what happened

8 that day, around the crime, you know, what happened at

9 the crime itself, maybe before or after the crime, and

10 what happened -- to just help you determine whether

11 the person is guilty of that crime. If you don't

12 think that the person is guilty of the crime and the

13 State hasn't proved it beyond a reasonable doubt, you

14 would vote not guilty and the case would be over.

15 But if you do think the State has proved

16 the case beyond a reasonable doubt you go on to the

17 second part of the trial. And the second part of the

18 trial we call "the punishment phase." And,

19 essentially, you might get to hear additional

20 evidence. You -- in order to decide what kind of

21 punishment he gets, you might get to hear what his

22 background's like. Does he have a good background or

23 bad background? Is he a good character or a bad

24 character? You know, has he been to prison ten times

25 before, or, you know, was he an Eagle Scout in school?

1 You know, that kind of stuff, to help you make a

2 decide -- decision on what punishment.

3 The reason you -- you hear all that

4 evidence, then you answer some certain questions. You

5 don't just go back there and say, "Well, I vote for

6 death," or, "I vote for life," and check off the

7 appropriate box. No, you answer certain questions and

8 based on how you answer those questions is what the

9 decision is going to be.

10 The first question is up there behind

11 you. I'm going to ask you to look at it in more

12 detail now. It says, "Is there a probability that the

13 Defendant would commit criminal acts of violence that

14 would constitute a continuing threat to society?" We

15 call that "the future dangerousness question."

16 Basically, do you think he's going to be a danger in

17 the future, okay? He's done this crime, but do you

18 think he's going to be a danger in the future.

19 And the key words I want you to look at

20 is that first line that says, "Is there a

21 probability." It doesn't say the State has to prove

22 with certainty because there's no way I could prove to

23 you for sure what's going to happen, unless, you know,

24 we have a crystal ball and you can look at the future.

25 And it doesn't require me to do that. It just says is

1 it probable, is it more likely than not that he would
2 commit these other crimes? Follow me?

3 A. Yes, sir.

4 Q. Because I don't -- nobody can predict the
5 future. The next part says, "would commit criminal
6 acts of violence." That's pretty broad, "criminal
7 acts of violence." Sometimes people say, "Well, we
8 could only give the death penalty if we think he's
9 going to actually commit another murder or another
10 capital murder." And I tell them, "No, it doesn't say
11 it has to be murder. It says says 'any criminal acts
12 of violence.'" Could be, you know, kicking somebody,
13 assaulting somebody, beating them up, whatever it is.
14 Could be -- so it doesn't necessarily have to be some
15 -- you think he's going to commit another murder.

16 And the last line says, "that would
17 constitute a continuing threat to society." Have you
18 ever heard that phrase before?

19 A. Yes, sir.

20 Q. And what does that mean to you?

21 A. That somebody's going to be a nuisance out
22 there.

23 Q. Okay. Probably a little more than a
24 nuisance.

25 A. Well, yeah.

1 Q. But the point is, could he commit criminal
2 acts of violence in the future and be a threat to
3 society?

4 A. Exactly.

5 Q. Well, sometimes people say, "Well, gosh, why
6 do you have to put him -- do the death penalty? Why
7 don't you just lock him up in prison? Give him a life
8 sentence and he's in prison, he won't hurt anybody."
9 And I always have to remind them, "Wait a minute, who
10 else is in a prison besides that person?" Tell me.

11 A. Other people like him.

12 Q. That's right. Other inmates. There's guards
13 there. There's probably people that work in the
14 prison, like, you know, maintenance people or the
15 warden and his family. In other words, we don't have
16 like a desert island where you set them out there and
17 they never have any human contact again, right.

18 So prison is actually part of society. I
19 mean, you've got some rights taken away from you, but
20 would you agree with me you're still seeing other
21 people, still interacting with other people?

22 A. Yes, sir.

23 Q. So the fact that they put somebody in prison,
24 does that mean they'll never hurt somebody again?

25 A. No. Absolutely not.

1 Q. And why is that? Have you ever heard about,
2 you know, prisoners attacking other prisoners or
3 prisoners attacking guards, you know, things like
4 that?

5 A. Yes, sir.

6 Q. It happens, right?

7 A. That's right.

8 Q. In other words, it's not fool proof that they
9 can't hurt anybody just because you lock them up,
10 right?

11 A. Exactly.

12 Q. Okay. So that's kind of what that question
13 says. Is there a good chance, is it probable that the
14 Defendant would commit criminal acts of violence that
15 would constitute a continuing threat to society? And
16 you answer that question yes or no.

17 Then you go to the second question. And
18 read it with me up, here. The Special Issue No. 2, we
19 call that "the mitigating circumstance question."
20 Mitigating circumstance is a word that basically means
21 "anything that would lessen or make less severe the
22 punishment."

23 A. That's what this word "mitigating" means.
24 Big word. Some lawyer dreamed it up, probably. But
25 basically, that's what it means, is there any reason

1 to lessen or make less severe the punishment? In
2 other words, he did the crime, but is there any reason
3 that you should give him a break for it and give him
4 life, instead of the death sentence.

5 What is a mitigating circumstance is up
6 to the jury to decide. Essentially, you can think of
7 it kind of like the opposite of aggravating
8 circumstances. You know, there's certain things that
9 are aggravating circumstances and certain things that
10 are mitigating circumstances.

11 Let's get away from the law talk for a
12 minute and give you an example. Say, for example,
13 you're called on a jury on two burglary cases.
14 There's two burglars. They're both equally guilty of
15 burglary because they both went into somebody's house
16 and stole something that didn't belong to them.
17 That's burglary, okay.

18 And so you're sitting there and you're a
19 homeowner and you're thinking, "Man these guys are
20 both burglars. This is bad. I'm going give them a
21 high sentence because they're both burglars."

22 And then you hear the surrounding facts
23 and circumstances. And the first burglar, the guy has
24 broken into a house. He's kicked in the door. He's
25 gone in the house and ransacked the house, torn it up,

1 taken all the money, all the jewelry, all the T.V.s,
 2 V.C.R., stereos, all that stuff of value, taken it all
 3 away. And you also hear that -- in the punishment
 4 phase of the trial that this isn't his first burglary.
 5 He's been to prison seven times before for guess what?
 6 Burglary. Okay? That's your first burglar.

7 Now, switch the scenario to the second
 8 burglar. Here's the second burglar. The second
 9 burglar has also gone into somebody's house and taken
 10 something without permission, but then you hear the
 11 surrounding circumstances of the background. And
 12 they're like this. This burglar didn't kick in the
 13 back door. The back door was unlocked and he went
 14 into the kitchen. He goes into the kitchen and he
 15 steals a loaf of bread and some food because he lost
 16 his job and he needed some food to feed his kids.
 17 They were hungry.

18 The house had jewelry and money and T.V.s
 19 and V.C.R.s and stereos. He didn't take any of that
 20 stuff. All he did was take the food. And you also
 21 find out, what about his background? This guy hadn't
 22 been to prison seven times for burglary. This is the
 23 first time he's ever been arrested in his life. He
 24 doesn't have any prior criminal history.

25 Now, when you first started out, right,

1 sentence." It's got to be enough to lower the
 2 sentence to life instead of death.

3 In other words, you may hear, "Well, he
 4 was a war hero; or you know, he made straight A's in
 5 school, he was on the honor roll; he helped little old
 6 ladies across the street," but you also made hear that
 7 he's been to prison ten times before, you know what
 8 I'm saying? So you have to wait till you hear
 9 everything and then if you hear it, is it enough to
 10 make it go lower?

11 So to sum up, it's kind of like this, say
 12 you had found him guilty of capital murder, he's
 13 guilty of doing the crime. You look at the special
 14 issue and you say, "Yes, I think he is -- there is a
 15 chance he's going to commit other criminal acts that
 16 might hurt somebody in the future." But before you --
 17 and looks like he's heading toward the death penalty,
 18 but the Judge says, "Stop, jury, wait. Before you
 19 impose the death penalty, look in -- take into
 20 consideration all of the evidence, everything you've
 21 heard in the courtroom, including the circumstances of
 22 the offense," that means, you know, what happened that
 23 day and the surrounding circumstances, "the
 24 Defendant's character and his background," you know,
 25 does he have good character, bad character, good

1 they're both burglars, right? Would you treat those
 2 burglars the same? Probably not, right? One of them
 3 has aggravating factors and you'd probably make it a
 4 higher sentence, and the other burglar has mitigating
 5 circumstances to make it less. So mitigating is just
 6 a big, fancy word saying is there any kind of
 7 circumstances or reason that you should lessen the
 8 sentence? I don't think anybody sitting on a jury
 9 would give that second guy the same thing you got the
 10 first guy, right?

11 A. That's right.

12 Q. I mean, there was -- you didn't know that at
 13 first, right, until you heard everything. You thought
 14 he was just another darn burglar. But then when you
 15 find out, hey, he just stole food, he didn't steal the
 16 other stuff, and he didn't kick in the door. He went
 17 in, it was unlocked, and he's never been arrested
 18 before, it makes a difference to you, right?

19 That's kind of what question addresses,
 20 Mr. Baucom, that, "Is there enough mitigating
 21 circumstance to warrant that a sentence of life in
 22 prison be imposed, rather than death?" What is a
 23 mitigating circumstances is up to the folks on the
 24 jury. This Judge is not going to tell you, "Well, you
 25 heard this and you automatically have to lower the

1 background, bad background, "and his personal moral
 2 culpability," is there enough, is there enough reasons
 3 "To warrant that a sentence of life, rather than a
 4 death sentence be imposed?"

5 It's kind of like a balancing test you
 6 have to do. You have to say, "Okay, I think he's
 7 guilty, I think he's a future danger, but is there any
 8 reason I should give him a life sentence?" If there
 9 is, then you give him a life sentence and vote yes.
 10 If there isn't, you say no, and he gets a death
 11 sentence. If you answer the first question yes and
 12 the second question no, this Defendant is sentenced to
 13 death. You see how it is? You don't just vote yes or
 14 no for death or life, you answer these questions.

15 What do you think of that, you think
 16 that's a pretty fair system to check on the jury to
 17 make sure they've covered everything before they make
 18 that big decision?

19 A. Yes, I think that is very fair.

20 Q. And wouldn't you want to know what his
 21 background is, you know?

22 A. Absolutely.

23 Q. Okay. Remember, though, he can testify if he
 24 wants to, if he doesn't want to, he doesn't have to.
 25 You can't hold that against him, okay? And you can

1 also make the decision based on just the heinousness
 2 of the crime itself. If the crime is a real terrible
 3 crime and he's never been to prison before or never
 4 been arrested before, you -- that doesn't mean you
 5 don't have to do it.

6 In other words, it's not just a
 7 first-time offender. It can be anybody get the death
 8 penalty, whether they've been to prison ten times or
 9 never been to prison before. You follow me on that?

10 A. Yes, sir.

11 Q. But you got to look at everything. And will
 12 you keep an open mind about these things?

13 A. Yes, sir.

14 Q. And -- and if there is some type of thing
 15 that says, "Hey, I didn't think about that, but maybe
 16 that would make me lower the sentence," could you
 17 lower the sentence to life, instead of death?

18 A. Yes.

19 Q. Depending on what you hear --

20 A. Right.

21 Q. -- right? And that's the bottom line what
 22 you have to do.

23 One of the other things that the law says
 24 is this, "Voluntary intoxication is not a defense to
 25 crime." Voluntary intoxication. In other words, if

1 has to prove the case beyond a reasonable doubt. You
 2 follow that?

3 A. Yes.

4 Q. Because some people say, "Well, he's sitting
 5 there. He must have done something. He must be
 6 guilty." And we have to say, "No, everybody is
 7 presumed innocent until the State proves he's guilty
 8 beyond a reasonable doubt." Can you do that?

9 A. Yes, sir.

10 Q. And you believe he's innocent until he's
 11 proven guilty, right?

12 A. Yes, sir.

13 Q. And the Fifth Amendment. He can testify if
 14 he wants to, but if he doesn't want to, he doesn't
 15 have to. And the law says you cannot hold it against
 16 him. Some people -- and it's kind of a natural thing,
 17 people say, "Well, I want to hear the other side of
 18 the story. I want to hear what he says." But I think
 19 you mentioned it earlier with the Judge, some people
 20 don't testify for whatever reason. But the point is,
 21 if he doesn't testify, I'm pretty sure this Judge is
 22 going to tell you you can't hold that against him.
 23 Would you be able to follow that law?

24 A. Yes, sir.

25 Q. Beyond a reasonable basically means that I

1 you go get yourself drunk or high on drugs and you
 2 commit a crime, can you say, "Hey, I'm not guilty. I
 3 was drunk when I did that crime." No, absolutely,
 4 not. The law says voluntary intoxication is not a
 5 defense to crime. The law also says, though, it may
 6 be considered as a possible mitigating circumstance.
 7 You know, some people will say, "Well, he robbed that
 8 bank, but he was drunk when he did it, so I'm going to
 9 give him a break." Other people may say, "I don't
 10 care if he was drunk or not when he robbed that bank,
 11 he's still got to pay for what he did. He's got
 12 suffer the consequences. It was his own fault he went
 13 out and got drunk or high on drugs." You follow me on
 14 that?

15 A. Yes, sir, I understand that.

16 Q. All right. So mitigating circumstances are
 17 up to the jury and what effect you give it is up to
 18 the jury, too. You just have to be open-minded and be
 19 able to listen to everything. Can you do that?

20 A. Yes, sir.

21 Q. Okay. The last few parts I want to cover
 22 with you are some legal questions, just to kind of go
 23 over them. Remember, just the fact that he's been
 24 indicted by the grand jury doesn't mean he is guilty.
 25 That just means he's charged with it. The State still

1 have to prove the case beyond a reasonable doubt, and
 2 it's the burden in this case or any case, it doesn't
 3 really matter. All I can tell you is it doesn't mean
 4 proof beyond all doubt or any doubt or shadow of a
 5 doubt. You always hear it on T.V., right, beyond a
 6 shadow of a doubt. That always kills me because
 7 that's not what the true standard is.

8 The law doesn't say I have to prove it to
 9 you beyond all doubt or any doubt. I mean, it would
 10 be hard for me to do that unless you were a witness
 11 and saw the whole thing, but the law doesn't require
 12 me to. It just says beyond a reasonable doubt. So
 13 the first thing I always tell me is, "Well, do you
 14 have a doubt? And, if you have a doubt, is there a
 15 reason for a doubt? Is there a reason for it, you
 16 know?"

17 Let me see if there's any other questions
 18 I want to cover with you. You understand that police
 19 officers are treated just like anybody else on the
 20 stand. They're not any better or any worse. So if
 21 you have a policeman testify, they're -- they're not
 22 given any extra special credit just because they're
 23 cops. You see what I'm saying?

24 A. Yes, sir.

25 Q. The law says every citizen is treated the

<p style="text-align: right;">124</p> <p>1 same, so whether it's the nun or a priest or a 2 preacher or a cop gets up on the stand, they're still 3 all equal. Do you believe that?</p> <p>4 A. Yes, sir.</p> <p>5 Q. Okay. And you can't just believe everything 6 they say just because what they -- what they do or 7 what their job is. You feel like you could be on this 8 jury?</p> <p>9 A. Yeah, I feel I could.</p> <p>10 Q. You feel you can be fair to both sides?</p> <p>11 A. Yes, sir.</p> <p>12 Q. You feel that you'll wait till you hear 13 everything before you make a decision?</p> <p>14 A. Yes, sir.</p> <p>15 Q. And if you make a decision, can you carry 16 through with it?</p> <p>17 A. Yes, sir.</p> <p>18 Q. Okay. Do you have any questions of me, Mr. 19 Baucom, because maybe I didn't explain something very 20 well or anything that I can go over with you?</p> <p>21 A. You went over it pretty well. Yeah, I think 22 you've done it before.</p> <p>23 MR. SKURKA: Well, I've been -- I've been 24 working here 22 years, but I just try to make sure 25 that everybody follows everything. Thank you so much</p>	<p style="text-align: right;">126</p> <p>1 of impartiality is just what you said. A person who 2 is impartial comes to the task with no prejudgments 3 about -- about the matter. They have a, as the Judge 4 said, open mind.</p> <p>5 Also, impartiality suggests that the 6 juror has no leanings toward one side or the other. 7 Those are biases. For example, if you were related to 8 the Defendant, you're an uncle or, you know -- you 9 would have a family bias. If you were related to the 10 injured -- the person that got killed in this case, 11 you would have a relational bias, okay, maybe a family 12 bias.</p> <p>13 They're all kinds of biases. There are 14 occupational biases. For example, if I am trying an 15 arson case, I'm not likely to put a fireman on my 16 jury. Why?</p> <p>17 A. Well, he may have a little bias about that 18 one.</p> <p>19 Q. Okay. I want -- I want firemen to be biased 20 against fires, okay? I want policemen to be biased 21 against drunk drivers, et cetera, okay? I want 22 emergency room doctors who sew people up to be biased 23 against gunshot wounds and stabbings and those kind of 24 things. All right?</p> <p>25 A. Yes, sir.</p>
<p style="text-align: right;">125</p> <p>1 for your time, Mr. Baucom.</p> <p>2 VENIREPERSON NO. 44: Thank you.</p> <p>3 MR. SKURKA: I'll let the Defense 4 attorneys talk to you now.</p> <p>5 VOIR DIRE EXAMINATION</p> <p>6 BY MR. JONES:</p> <p>7 Q. The -- under the Texas law and the federal 8 law, the person -- citizen who's been charged with a 9 crime has a right to trial by jury. In a felony case, 10 he has the right to be tried by a jury of 12 citizens. 11 Not only does the Defendant in this case, because he's 12 a citizen, have a right to a jury of 12, he has a 13 right to have that jury be impartial. A 14 constitutional right to jury trial is a right to an 15 impartial jury. You understand that?</p> <p>16 A. Yes, sir.</p> <p>17 Q. What does that word, "impartial," mean to 18 you?</p> <p>19 A. Somebody that's going to judge that trial 20 based on those facts as they're given, not on some 21 preconceived notion that they've got made up in their 22 mind.</p> <p>23 Q. Okay.</p> <p>24 A. They're going to look at it from ground zero.</p> <p>25 Q. Well, one factor, one part of the definition</p>	<p style="text-align: right;">127</p> <p>1 Q. But in -- in -- so you can imagine different 2 occupations might bring a bias to the courtroom, just 3 because that's the way it is. Might be hard for them 4 to hear the case.</p> <p>5 Now, one of the questions that the Judge 6 asked you or mentioned to you was about the Fifth 7 Amendment. The Fifth Amendment says that a defendant 8 does not have to testify, and also says that if he 9 doesn't, you can't use that against him. That's one 10 of the most difficult rules to follow, okay, because 11 -- because -- I always say the street logic says, the 12 street morality says that, you know, "If a person 13 didn't do it, he ought to get up and say so, okay? I 14 want to hear both sides of the story," okay? But in 15 the -- in our criminal law system, that's not the 16 case. The Defendant doesn't have to say anything, 17 doesn't have to testify and the State can't argue he's 18 guilty because he remains silent.</p> <p>19 Do you -- do you agree with that rule.</p> <p>20 A. Yes, I absolutely do.</p> <p>21 Q. Why?</p> <p>22 A. Because a person that's not a good testifier 23 and a good talker could get up there and just say the 24 wrong thing, and the jury take it wrong and understand 25 it wrong --</p>

<p style="text-align: right;">128</p> <p>1 Q. Uh-huh.</p> <p>2 A. -- and he could actually be hurting himself,</p> <p>3 and -- unintentionally, by his own words, and be</p> <p>4 misunderstood or something from that jury. So it's</p> <p>5 really -- I would say, right off hand, a lot of times</p> <p>6 it's better for a guy not to say anything because he's</p> <p>7 not a professional talker.</p> <p>8 Q. Any other reasons why you agree with that?</p> <p>9 A. And that's probably the reason you need to</p> <p>10 hire an attorney.</p> <p>11 Q. Okay.</p> <p>12 A. Any reason for what, now?</p> <p>13 Q. For the right to remain silent.</p> <p>14 A. I don't know. That's in the Constitution, so</p> <p>15 there's -- there's a reason, but I -- I don't know.</p> <p>16 Q. Who has -- who brings the charges in a</p> <p>17 criminal case?</p> <p>18 A. That's right, the State does. So they're the</p> <p>19 only ones that really have to say anything.</p> <p>20 Q. Okay.</p> <p>21 A. I forgot about that.</p> <p>22 Q. Who has the burden of proof in a criminal</p> <p>23 case?</p> <p>24 A. The State.</p> <p>25 Q. Now, I may have misunderstood you, but the</p>	<p style="text-align: right;">130</p> <p>1 I don't know what I'd feel, actually.</p> <p>2 Q. Well, ideally, if you're -- if you're picked</p> <p>3 as a juror, you should come to the task with no</p> <p>4 expectations. You don't know what happened. I don't</p> <p>5 know, you know? The State said -- has charged this</p> <p>6 Defendant with a crime. The State has the burden of</p> <p>7 proof. I don't know whether the State can prove it or</p> <p>8 not, okay? I'm here to see, okay? Could that -- does</p> <p>9 that -- would that be your -- your position if you</p> <p>10 started --</p> <p>11 A. Yes, I believe so.</p> <p>12 Q. Okay. You qualified your answer, "I believe</p> <p>13 so."</p> <p>14 A. Yeah, well, I -- I'm not a God. I have -- I</p> <p>15 have to qualify everything I say, yeah.</p> <p>16 Q. Okay. Now, do you believe in the -- in trial</p> <p>17 by jury?</p> <p>18 A. Absolutely.</p> <p>19 Q. Why do you believe in trial by jury? Why is</p> <p>20 that important, especially in a criminal case?</p> <p>21 A. Well, I've read a little bit about it, not</p> <p>22 much. But the jury of the peers, like he -- like he</p> <p>23 said about the break-in on the house, where the guy --</p> <p>24 two people broke in houses. And that's the reason the</p> <p>25 law says, you break in a house, bingo, you're adios</p>
<p style="text-align: right;">129</p> <p>1 Judge said -- he said, you know, the Defendant doesn't</p> <p>2 have to testify and -- and would you hold that against</p> <p>3 him and you said, "No, I think it's a good idea for</p> <p>4 him not to testify." And I -- I -- the way you said</p> <p>5 it, I -- I sensed that you thought it was a good idea</p> <p>6 because if he gets up, he's going to incriminate</p> <p>7 himself, you know.</p> <p>8 And -- in other words, he's going to --</p> <p>9 you had an assumption there that he's probably guilty</p> <p>10 and then it would be stupid for him to get up and</p> <p>11 testify.</p> <p>12 A. No. If he is guilty, he could incriminate</p> <p>13 him -- I mean, he could -- if he's not guilty, he</p> <p>14 could get up and testify and incriminate himself in</p> <p>15 the mind of the jury. They're hearing things through</p> <p>16 their own filter and he could say the wrong thing,</p> <p>17 unintentionally, and not being on the same plain as</p> <p>18 some of them are. And so he could incriminate</p> <p>19 himself, even if he's not guilty. If he is guilty,</p> <p>20 well, you know, but...</p> <p>21 Q. Well, sitting here right now, do you have any</p> <p>22 feelings that the Defendant is guilty and if you're</p> <p>23 picked on the jury, you're simply going to be looking</p> <p>24 for confirmation of -- of what you already feel?</p> <p>25 A. I really don't -- I don't know what I feel.</p>	<p style="text-align: right;">131</p> <p>1 to, you know, get some kind of punishment, whatever it</p> <p>2 says. But that's the reason you have a jury is to</p> <p>3 kind of interpret, well, this guy -- one person --</p> <p>4 there's some big difference between those two robbers,</p> <p>5 I mean, the two -- not robbers, thieves, big</p> <p>6 difference there, and that's what the jury is for is</p> <p>7 to look at those things involved --</p> <p>8 Q. Well, a judge can do that.</p> <p>9 A. -- and temper the law.</p> <p>10 Q. Well, a judge could do that. Why don't we</p> <p>11 have just have judges set punishment?</p> <p>12 A. Well, that's -- that's what they do in some</p> <p>13 other countries and I -- it's --</p> <p>14 Q. I just wanted to --</p> <p>15 A. We have a jury by peers here, you know, which</p> <p>16 you know better than I do --</p> <p>17 Q. Why don't we just let the chief of police</p> <p>18 decide it? He investigated the case and he says the</p> <p>19 guy's guilty, that should be good enough, right?</p> <p>20 A. No. He'd let all his relatives go and</p> <p>21 everybody else would go to -- get the penalty.</p> <p>22 Q. Okay. Well --</p> <p>23 A. I mean, I don't know the new police -- oh,</p> <p>24 well, yeah, I do, but -- not really, but I've seen his</p> <p>25 name.</p>

<p style="text-align: right;">132</p> <p>1 Q. We don't normally think about this, but, you 2 know, every society, including our own, has to have a 3 system of -- of laws which define what conduct is 4 forbidden. We have to have a system for enforcing 5 those laws. And we have to have a system of sanctions 6 for people who choose not to follow the law, okay. 7 And, now, from -- from where does that 8 power come? Where does the government get its power 9 in this country?</p> <p>10 A. Get it from the people.</p> <p>11 Q. That's right. And we just did it about a 12 week ago, didn't we, on November the 4th? We put in a 13 bunch of new -- put in a new president, governors and 14 a bunch of other people, right?</p> <p>15 A. Yes, sir.</p> <p>16 Q. All right. So the -- in the United States 17 the power of the government comes from the electorate. 18 Who's on the jury?</p> <p>19 A. The people.</p> <p>20 Q. The people. It's a little cross-section of 21 the people, right, from this -- from this county, this 22 judicial district, right?</p> <p>23 A. Peers.</p> <p>24 Q. Now, so under our system, before the 25 government can declare someone guilty of a crime and</p>	<p style="text-align: right;">134</p> <p>1 discharged?</p> <p>2 A. Yes, sir, yeah.</p> <p>3 Q. Don't you run the risk of from time to time 4 of letting a person who's actually guilty go free?</p> <p>5 A. There's risk, yeah.</p> <p>6 Q. Okay. Is it worse to convict an innocent 7 person or to let a guilty person go free? Which is 8 worse?</p> <p>9 A. It's probably worse to -- oh, worse to 10 convict a -- I mean, to convict a innocent person.</p> <p>11 Q. That's right. Have you read stories -- it 12 seems like in the last couple of years there's been a 13 lot of stories in the newspaper, on the television, 14 some magazines have picked up the stories about cases 15 coming, particularly out of Dallas County, about 16 people who have been convicted of various crimes, 17 particularly sexual crimes, only to be found later 18 that they were factually innocent because the D.N.A. 19 testing showed that they were?</p> <p>20 A. Oh, yes, sir.</p> <p>21 Q. When you read a story -- have you read those 22 stories like those?</p> <p>23 A. Oh, yes, sir.</p> <p>24 Q. When you read a story like that, how does it 25 make you feel?</p>
<p style="text-align: right;">133</p> <p>1 -- and impose a sanction on him, it's got to get the 2 approval of the source of the power, namely, the 3 people, okay? That's the jury. Do you agree with 4 that?</p> <p>5 A. Yes, sir.</p> <p>6 Q. You think that's a good way to do business?</p> <p>7 A. Best in the world.</p> <p>8 Q. Okay. So the jury is an -- is an independent 9 body. It's actually part of the Judicial Branch, but, 10 as it functions, it's an independent body. It's not a 11 rubber stamp of the district attorney's office or the 12 court or any -- or the police department or anybody 13 else. They sit apart, okay, and they -- they come 14 into the courtroom and -- and say, "Okay, Mr. 15 Prosecutor, you say you've got an indictment, here. 16 Let's hear it, okay? And I'm not going to let you do 17 anything unless you prove what you say beyond a 18 reasonable doubt. If you can't do it," then what -- 19 what are you going to do in that case?</p> <p>20 A. Not guilty.</p> <p>21 Q. Not guilty. That's what not guilty means, is 22 it not? It means the State hasn't proved their case.</p> <p>23 A. Yes, sir.</p> <p>24 Q. Do you agree with that system that a person 25 who's been found not guilty should be -- should be</p>	<p style="text-align: right;">135</p> <p>1 A. I feel like society's wrong. I've seen 2 people have been locked up 15, 20 years, and I 3 thought, boy, that's horrible.</p> <p>4 Q. Okay. So does it make if you feel bad when 5 you read a story about -- you feel bad for the --</p> <p>6 A. Sure does, sure does.</p> <p>7 Q. So you have to -- you have to confront the 8 fact that in our -- in our system innocent people can 9 be convicted from time to time because we're 10 imperfect, right?</p> <p>11 A. Absolutely.</p> <p>12 Q. Okay. Now, we go to great ends to avoid 13 that. It mean, like beyond a reasonable doubt is the 14 standard of proof in a criminal case, okay.</p> <p>15 Why do you think the legislature imposed 16 that high standard of proof, the high degree of 17 certainty required by beyond a reasonable doubt? Why 18 -- why do you suppose that that's applied to criminal 19 cases, rather than some lesser standard like 20 preponderance of the evidence or probable cause?</p> <p>21 A. Because this is something more serious.</p> <p>22 Q. Why is it more serious?</p> <p>23 A. It's more serious than just a fine or 24 something like that.</p> <p>25 Q. What's at stake in a felony criminal case?</p>

1 A. A person's freedom or their life.
 2 Q. You got it. It's American -- our American
 3 Civilization values what above all?
 4 A. Life.
 5 Q. Liberty.
 6 A. Yeah, liberty, freedom.
 7 Q. Okay. And so we set it up. Before the
 8 government can take that away, we've got to be sure
 9 that it's necessary. We want to be right. We just
 10 don't want to do it off -- off-the-cuff, right? Do
 11 you agree with that?
 12 A. Absolutely.
 13 Q. Now, in a -- I'm working up my way to another
 14 question, here. In -- in criminal cases, we have an
 15 elaborate appeal process. If the Defendant is found
 16 guilty, he has a right to appeal this case. It can go
 17 up all the way to the Supreme Court of the United
 18 States, depending on what the issues are.
 19 And the purpose of that appeal process is
 20 to correct mistakes. We have don't like to make
 21 mistakes. If we think a big one has been made we have
 22 a machinery for correcting it. Like those guys that
 23 got released in Dallas after serving -- there was --
 24 there was an appellate remedy that allowed that to
 25 happen, okay? The good news for those guys were is

1 yeah.
 2 (Document perused.)
 3 (Short recess.)
 4 THE COURT: All right. Sorry about that,
 5 guys.
 6 Q. (BY MR. JONES) Okay. We're back on the
 7 record. Now, let's see, I was asking you about the --
 8 your questionnaire, there. You selected ten on that
 9 scale.
 10 A. Yes, sir. I remember that question. That
 11 question on the piece of paper, here, you ask for a
 12 cut and dried answer, and without any -- I put ten
 13 there, thinking in my mind that if the evidence and
 14 the whole -- all the criterion were met and everything
 15 presented, that I do believe in the death penalty.
 16 But then, again, if it didn't meet all those
 17 criterion, then I'd put a one.
 18 So, in other words, this is asking the
 19 question without any qualification, so it's really a
 20 --
 21 Q. That -- that's why I'm asking you --
 22 A. Yeah.
 23 Q. -- if you want to clarify it. You weren't
 24 just saying that from a political standpoint I'm
 25 strongly in favor of the death penalty?

1 they were alive, okay? If they had been convicted of
 2 capital murder back then, and -- 20 years ago, they
 3 probably would be dead now, right, because the
 4 sentence would have been carried out.

1 A. Absolutely, yeah, I'm --
 2 Q. You're not saying that?
 3 A. Right, I'd have to look at each case myself.
 4 Q. Okay. Now, you've said that you're generally
 5 in favor of the death penalty as being a form of
 6 punishment that we should have in Texas.
 7 A. Yes. If the individual case warrants it.
 8 Q. I understand. But it's a -- it's a type of
 9 punishment which the legislature has authorized --
 10 A. That's right.

5 A. Yes, sir.
 6 Q. Okay. Now, on your questionnaire, on page
 7 26, it has the scale thing, and, you know, like, it
 8 says, "How strongly do you believe in the death
 9 penalty? Circle one to ten." And you -- you selected
 10 ten being the strongest. Why did you select ten?
 11 A. Run that -- some of those questions were kind
 12 of difficult to --

13 MR. JONES: May I approach?
 14 THE COURT: Yeah.
 15 VENIREPERSON NO. 44: Yeah, run the
 16 question by me. I'd have to look at that question.
 17 MR. JONES: We'll let you look at it
 18 directly, okay?
 19 THE COURT: Why don't you look at it. I
 20 have to make -- I have to make a short phone call. Be
 21 right back. In the meantime, can you look at it?
 22 VENIREPERSON NO. 44: Sure.
 23 MR. JONES: Just look at it, so you'll
 24 know what I'm -- this part right here.
 25 VENIREPERSON NO. 44: Let's see. Oh,

12 Q. -- for certain kinds of cases. Obviously,
 13 they're the more serious cases, right?
 14 A. Yes.
 15 Q. But you believe that that's a good idea to
 16 have that option.
 17 A. I think so. But, you know, I'd have to look
 18 at the case. I mean, I couldn't say for a particular
 19 case.
 20 Q. No, just generally.
 21 A. In generally, yes.
 22 Q. Generally.
 23 A. Generally, I think it's a good option.
 24 Q. Okay. Now, why -- why do you think our
 25 society benefits from having that option, from having
 the death penalty? What -- I mean, the legislature

1 passed it. I'm sure they debated it and talked about
 2 it and -- and I'm sure they discussed how our society
 3 would benefit by having the death penalty as an option
 4 in some serious cases.

5 How do you feel about that or how do you
 6 think our society benefits

7 A. Well, there's a lot of controversy about
 8 that, but --

9 Q. I want to know what you feel.

10 A. Well, the way I feel is that we have -- we do
 11 have the best trial system in the world.

12 Q. Okay.

13 A. We have the jury that can look at the case.
 14 So it's -- the death penalty, in other words, it's not
 15 automatic.

16 Q. Uh-huh.

17 A. So each case has to be judged on its own
 18 merit. And if a case warrants it, they get -- the
 19 death penalty is available. If the case doesn't
 20 warrant the death penalty and maybe life imprisonment
 21 or something else, then that's also available. So
 22 this -- this way everything is available and each case
 23 has to be judged on its own merit.

24 Q. I -- with all due respect to you, sir, I
 25 don't think you answered my question.

1 Q. Okay. So removal and deterrence are the two
 2 things that would you think about as a benefit, right?

3 A. Yes.

4 Q. Okay. You know, most people don't get into
 5 this discussion every day, so you're --

6 A. Yeah, it's --

7 Q. -- we're hitting you cold with it. I can see
 8 your brain --

9 A. Yeah.

10 Q. -- turning and thinking about these
 11 questions, but this is our only chance to talk to you.

12 A. Yeah.

13 Q. Now, we've discussed the -- the reality that
 14 from time to time, you know, innocent people will be
 15 convicted of crimes. Do you think the benefits of the
 16 death penalty are -- are worth from time to time
 17 executing an innocent person?

18 A. Well, one thing I think is that there's --
 19 Texas is pretty high on the list for -- in the nation.
 20 But overall, out of the number of crimes that are
 21 committed, there's only a very few people get the
 22 death penalty.

23 Q. Okay.

24 A. Percentage wise. I have no idea -- you
 25 fellows would know, but I have no idea, but it's not a

1 A. Oh, I'm sorry.

2 Q. What I'm saying is what benefit do we enjoy
 3 or experience from having the death penalty as a form
 4 of punishment?

5 A. What benefit? Well --

6 Q. Society. What -- how are we better off by
 7 having that, rather than not having it?

8 A. Well, one thing is, I learned, I hadn't
 9 thought about before, but in that prison, that is a --
 10 there are other people in there in danger. And so,
 11 that -- that's one benefit right there.

12 Q. Okay. That it would remove certain people
 13 from our midst, right?

14 A. Right, or inside the prison, even, you know?

15 Q. Okay. So is that -- is that the benefit that
 16 you think we -- we enjoy or experience, that certain
 17 people will be removed from society permanently so
 18 they can't cause us anymore problems?

19 A. It may send a message to potential criminals.

20 Q. Okay.

21 A. To a certain degree.

22 Q. That would be a benefit. It would be a
 23 deterrence to others who might be inclined to commit
 24 those kinds of offense.

25 A. That's right.

1 huge number percentage wise.

2 Q. Okay.

3 A. So...

4 Q. So, in other words, if by chance maybe 1 in
 5 300 death penalty cases an innocent man is executed,
 6 that's -- that's a cost that you're willing to pay in
 7 order to have the benefits of the death penalty?

8 A. I -- I don't think that that many -- I don't
 9 think that happens that much.

10 Q. Okay. But -- but even if it happens anytime,
 11 you're -- you're willing to accept that as a -- as one
 12 of the costs of having the benefit?

13 A. That's a potential thing that could happen.

14 Q. Okay. You know, like the National Rifle
 15 Association said that people have -- having handguns
 16 is a right that's -- that's so important that it's --
 17 that's it's -- was willing to have it at the price of
 18 people being shot from time to time, you know? So --
 19 okay, well, I think you answered my question.

20 Now, under the Texas procedure that the
 21 Judge explained to you in -- in the opening and that
 22 Mr. Skurka went over, the jury -- if the jury finds a
 23 person guilty of capital murder, what other -- what
 24 two punishments are available?

25 A. Life in prison or the death sentence.

1 Q. That's right. There's only two options.

2 A. That's right.

3 Q. Now, the jury today, in 2008, does not --
4 faced with that decision does not go back in the jury
5 room and write life or death on a piece of paper, on a
6 verdict form. Instead, they're given these two
7 questions. What these two questions do is determine
8 whether two conditions exist, and the legislature says
9 that if these two conditions exist, then the death
10 penalty is -- is automatic, okay?

11 A. Uh-huh.

12 Q. If they don't exist, then the life sentence
13 is automatic. So what are the two -- Well, there's
14 actually three conditions that have to be met before a
15 person can get the death penalty in Texas. What is
16 the first one?

17 A. Well, see, the first one is it a capital, a
18 murder?

19 Q. They have to be found guilty of the offense.

20 A. Right.

21 Q. Okay. All right, given that, then there's
22 two more conditions. What is the next condition?

23 A. Let's see. Okay, capital murder. And then I
24 guess this one (indicating).

25 Q. Okay. How does that question have to be

1 Q. -- if you answer that question no.

2 A. Oh, okay.

3 Q. Okay. Does that make sense?
4 A. Yes.

5 Q. Okay. Then -- all right. So then -- but if
6 you answer the -- the jury answers the question yes,
7 then you proceed to Special Issue No. 2, which is --
8 can you see it from your chair there?

9 A. Yes, sir.

10 Q. Okay. Now, what answer to that question
11 will -- will cause the death penalty to occur? The
12 question asks for a yes or no answer. What answer
13 will produce the death penalty?

14 A. I say a yes would get you -- would get him a
15 life -- life in prison. A no -- let's see, a no would
16 get him the death penalty.

17 Q. You got it, you got it. You understand it.

18 Now, let's look at the question. If I'd been in the
19 legislature at the time that was written, I would have
20 written it different. It was not written for the
21 common man, but we have it and we're going to have to
22 deal with it.

23 A. Yeah.

24 Q. The Supreme Court says that before a person
25 can get the death penalty, the jury's decision has to

1 answered? What finding has to be made there before --
2 to meet one of the conditions?

3 A. They'd have to say yes.

4 Q. That's right, exactly. It's got to be a --
5 call that "a continuing threat."

6 A. Right.

7 Q. Okay. And this -- there has to be evidence
8 on that and you have to find that beyond a reasonable
9 doubt.

10 A. Yes.

11 Q. Now, the Judge will instruct you, if we get
12 that far, that if you answer that question no your
13 deliberation stops. And the Judge -- the verdict form
14 and the Defendant gets what punishment?

15 A. Not guilty.

16 Q. Exactly. Okay. Because that condition can't
17 be met.

18 THE COURT: Rather life.

19 Q. (BY MR. JONES) Life. He gets -- oh, I'm
20 sorry. He gets life.

21 THE COURT: He's still guilty.

22 Q. (BY MR. JONES) He's still guilty --

23 A. Oh...

24 Q. -- but he gets a life sentence --

25 A. Okay.

1 be a guided one. And the purpose of these issues is
2 to guide the jury, okay? So let's say this issue
3 tells you to take certain things into consideration.
4 What's the first one? "Circumstances of the offense."
5 Okay, well, you've already found the Defendant guilty,
6 so you've heard all the facts about what happened, so
7 you can consider that, the manner in which the offense
8 was committed, et cetera.

9 Then the next thing is "the defendant's
10 character and background." If I say that you, sir,
11 have -- are a man of good character, what does that
12 mean?

13 A. That means that, in front of you, I've
14 behaved in such a manner to lead you to believe that I
15 have good character.

16 Q. Okay.

17 A. But only in front of you.

18 Q. Well, but do you agree that -- that our
19 society has a certain basic moral code? In other
20 words, we have certain standards of behavior, which
21 everybody generally agrees are good conduct.

22 A. Yes, sir. Pretty much, yeah.

23 Q. Okay. It's bad to steal. It's -- you know,
24 it's -- you know, the Ten Commandments. These are --
25 these are moral values that we kind of generally

<p style="text-align: right;">148</p> <p>1 accept as our society. They -- they go back to the 2 beginning -- to our Judeo-Christian beginnings, okay? 3 Do you agree?</p> <p>4 A. Yes, sir.</p> <p>5 Q. Now, do you agree that if a person is -- has 6 good character -- if you say a person has good 7 character that means that, generally, as far as you're 8 concerned, conforms to that standard?</p> <p>9 A. Yes.</p> <p>10 Q. If I say you have good character, that means 11 that I -- I think you're trustworthy, you're loyal, 12 helpful, friendly, courteous guy, you know, the Boy 13 Scout. In other words, you conform -- from my 14 experience in dealing you, you have good character.</p> <p>15 A. Yes, sir.</p> <p>16 Q. Now, background. Well, background is your 17 personal history, your biography, you know, where you 18 were born, how you grew up, what schools you went to, 19 health problems, you may have had, you know, whatever. 20 That's -- that's easy, okay, and you would expect to 21 hear that kind of evidence in a case like this.</p> <p>22 Now, the next one's a little more 23 difficult. "The personal moral culpability of the 24 Defendant." What does that mean and what is that 25 asking you to consider?</p>	<p style="text-align: right;">150</p> <p>1 starving at the house. And, you know, he had -- 2 Q. Okay. All right. In both cases, the -- the 3 two people were guilty of the crime, right? What was 4 it -- I think it was burglary that he said?</p> <p>5 A. It was a theft or -- yes, sir.</p> <p>6 Q. Theft. Okay, one person stole because he was 7 greedy and just wanted to get some extra money without 8 working for it. The other guy was stealing to -- 9 they're both guilty, right?</p> <p>10 A. Right.</p> <p>11 Q. Of the crime.</p> <p>12 A. Yeah.</p> <p>13 Q. But are they both morally culpable to the 14 same degree?</p> <p>15 A. No.</p> <p>16 Q. No. Why? Stealing is stealing.</p> <p>17 A. Yeah. Right, but that other one had -- had 18 different motivation involved, a lot -- a more -- more 19 acceptable reason for doing it.</p> <p>20 Q. Okay. So it's --</p> <p>21 A. He had to feed his children, you know.</p> <p>22 Q. Well, when the legislature sets up ranges of 23 punishment, they not only ask the jury to find whether 24 the Defendant is guilty of the crime, but they also 25 ask you to decide how guilty is he, you know? In</p>
<p style="text-align: right;">149</p> <p>1 A. What -- what things -- what was going through 2 a person's mind and what kind of pressures was he 3 under when he committed this thing.</p> <p>4 Q. That's the closest in this trial that -- 5 you've come the closest to answering the question of 6 anybody. What was going on in his mind? Now, the 7 word, "moral" suggests, as the word, "character" 8 suggests there's a standard out there someplace, 9 right?</p> <p>10 A. Yeah, probably.</p> <p>11 Q. Okay. Probably that same general standard of 12 moral conduct that we kind of all generally accept, 13 would be a measure of whether a person is a good man 14 or a bad man, right? Now "culpability" means?</p> <p>15 A. Guilt.</p> <p>16 Q. Guilt -- well, it means that you're subject 17 to blame, okay? So if a person steals, he's morally 18 culpable because he's broken one of the -- the moral 19 codes, okay? So, when you're considering that, what 20 was going on in his mind, what -- what value system is 21 this guy operating under, you know, at the time that 22 he's engaged in the conduct, how do you consider that 23 as being -- possibly being a mitigating circumstance?</p> <p>24 A. Well, like he was saying about the two 25 robberies, you know, one of them his kids were</p>	<p style="text-align: right;">151</p> <p>1 other words, what punishment are we going to give him? 2 And so, that's -- that's basically what 3 that -- the "personal moral culpability," what was 4 going on in his mind, what was motivating him, and... 5 Now, the example that Mr. Skurka gave 6 you, the two guys, they're both guilty of theft. And, 7 you know, you say, "Well, why should I give one a 8 lesser punishment than the other?" Because there are 9 other factors involved, are there not? And I think 10 where you run into these factors are -- and this is 11 where the mitigation or to lessen comes in, when you 12 have -- when a person is confronted with competing 13 moral values and he engages in the conduct, like the 14 person who was stealing to -- to feed his family, he 15 was faced with two competing moral values, right?</p> <p>16 A. Yes, he was.</p> <p>17 Q. What are they? What are there? One, was the 18 duty to support his -- to feed his kids, right?</p> <p>19 A. Right.</p> <p>20 Q. The other one was the duty not to steal, 21 okay? And he was faced with, "What do I do," you 22 know? Well, he picked one, okay? And so the jury can 23 say, "Okay. Well, that, I can -- I can understand 24 that. We're not going to," you know, you can see how 25 a person can get into that situation. And you -- and</p>

<p style="text-align: right;">152</p> <p>1 you give him credit for that, you know, you adjust the 2 punishment accordingly to reach a just result. 3 A. Yes. 4 Q. Okay. I think you understand that. 5 A. Pretty well, yeah. 6 Q. Okay. Now, do you -- let's drop down to that 7 last little paragraph. You understand what the word 8 "To mitigate" means, the verb "to mitigate." 9 A. That means a circumstance that's -- like a 10 motivation that... 11 Q. Let -- let me assist you. 12 A. Good deal. 13 Q. The verb "to mitigate" means to lessen. 14 A. To lessen? 15 Q. To lessen. 16 A. Okay. 17 Q. And, in the context of a criminal case, a 18 mitigating circumstance is one that would cause you to 19 want to vote for a lesser punishment. It's that 20 simple. 21 A. Yeah. 22 Q. The Judge will instruct the jury that they 23 determine what is the mitigating circumstances. If 24 you're on the jury, you'll be hearing all this 25 evidence. You can pick out any fact that's in</p>	<p style="text-align: right;">154</p> <p>1 decision before the jury can announce its verdict, 12 2 people have to vote. But, in this case, if -- if 10 3 people vote yes, okay, it takes 10 votes to get a yes 4 or no answer; you don't have to have 12. And that 5 benefits the accused, does it not? In other words, it 6 takes a little bit less to get to a life sentence. 7 Okay. Ten people vote yes, then the Judge will just 8 follow the instruction. Doesn't require a vote of 12. 9 Now, I want to ask you -- let's see, 10 you're retired? 11 A. Yes. 12 Q. Okay. And -- and you -- one of your hobby -- 13 or your pastimes is to write these religious tracts? 14 A. I just wrote one; one. 15 Q. You've just written one? 16 A. Right. 17 Q. Did I encounter you at the steps of the 18 courthouse the other day? 19 A. I don't -- I don't -- there's so many people 20 out there, I don't remember who I saw. 21 Q. But did you hand these out at the courthouse? 22 A. I did. Sure did. 23 Q. Have you done that in the past or was that 24 the first time you had done it? 25 A. I probably done it three or four times.</p>
<p style="text-align: right;">153</p> <p>1 evidence before you and choose to believe it to be a 2 mitigating circumstance. For example, you can 3 consider his age to -- for you to be a mitigating 4 circumstance, or the fact that he may have served in 5 the military to be a mitigating circumstance or 6 something that happened in his upbringing you can 7 consider. Whether he was confronted with competing 8 moral values when he engaged in the conduct, if he 9 did, et cetera, okay? 10 So you think you understand what the word 11 "To mitigate" is? 12 A. Yes, sir. 13 Q. And you -- there's virtually no limitation on 14 what you can -- there is no limit limitation on what 15 you can consider to be a mitigating circumstance if it 16 is in evidence, okay. 17 The Judge will also tell you that the 18 jurors don't have to agree on what is a mitigating 19 circumstance. You can say, "Well, I think the man's 20 age is a mitigating circumstance, a young fellow." 21 The other juror says, "I don't think so. I don't 22 consider it to be so." You-all don't have to agree. 23 Now, one other rule which we haven't 24 discussed is you've been told that, just generally, in 25 a criminal case a verdict requires a unanimous</p>	<p style="text-align: right;">155</p> <p>1 Q. Okay. Do you -- is the courthouse your -- 2 one of your places where you hand these out? 3 A. Just once in a while. 4 Q. Once in a while. 5 A. Uh-huh. 6 Q. Okay. 7 A. Because there's a big crowd that comes 8 through that door down there, believe it or not. 9 Q. And tell me, again, the purpose of your doing 10 that? You're exercising your right of free speech, 11 for sure, I know that, but what is your -- why do you 12 take the time to do that? 13 A. Because I think it will help people. 14 Q. Okay. 15 A. In fact, I know for a fact that it will help 16 them. 17 Q. All right. Are you familiar with the New 18 Testament? 19 A. So-so. 20 Q. Okay. And what prominent figure in the New 21 Testament got the death penalty? 22 A. Jesus himself. 23 Q. Right. You think he got a fair trial? 24 A. No. 25 Q. Okay.</p>

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1	A. Have you ever studied that trial?	1	agree.
2	Q. I haven't -- I've read articles about it, and	2	THE COURT: Okay. Now, the other thing,
3	there's -- but there's reams, there's books written on	3	Mr. Baucom, this trial should start on the 1st of
4	the fairness and the manner of that trial.	4	December. It's going to at least take that week. It
5	A. I bet there has.	5	may spill into the next week. Just letting you know.
6	Q. Yeah, for sure. Not likely to have happened	6	We'll be keeping in touch with you about that and let
7	in the United States. Okay. You -- is that enough?	7	you know when to come back. I don't want you to talk
8	MR. JONES: Okay, that's all I have.	8	about this case with anybody, okay?
9	THE COURT: All right.	9	VENIREPERSON NO. 44: Okay.
10	MR. SKURKA: We have no other questions,	10	THE COURT: Somebody tries to talk to you
11	Judge.	11	about it you say, "Nuh-uh, Judge said don't -- I
12	THE COURT: Okay. Why don't you wait in	12	can't talk to you about the facts of this case." When
13	the -- in the jury room. I'm going to talk to the	13	the case is over with, that's something else, but
14	lawyers and we'll call you back in a moment, okay?	14	right now, don't talk to anybody about it, okay?
15	VENIREPERSON NO. 44: Okay. Thank you,	15	VENIREPERSON NO. 44: Yes, sir.
16	folks, for your time.	16	THE COURT: All right. We'll keep in
17	THE COURT: Thank you.	17	touch. So we'll see you soon.
18	MR. JONES: Thank you for your time.	18	VENIREPERSON NO. 44: Okay.
19	(Venireperson exits courtroom.)	19	THE COURT: All right.
20	THE COURT: All right. Mr. Skurka, what	20	VENIREPERSON NO. 44: Thank you very
21	say you?	21	much. You-all have a nice day.
22	MR. SKURKA: Just one moment, Your Honor.	22	MR. SKURKA: You, too, sir.
23	(Brief pause.)	23	(Venireperson exits courtroom.)
24	MR. SKURKA: We'll accept the juror,	24	THE COURT: Okay. Do we have the next
25	Judge.	25	person, Frank?
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1	MR. JONES: We'll accept.	1	THE BAILIFF: Yes, sir.
2	MR. GARZA: We'll accept, Judge.	2	THE COURT: I mean, let's take a little
3	THE COURT: All right. That's Juror No.	3	bit of a break and then we'll -- we'll finish with
4	6. Bring him in.	4	this next person.
5	(Venireperson enters courtroom.)	5	(Short recess.)
6	THE COURT: All right. Mr. Baucom, --	6	(Venireperson enters courtroom.)
7	VENIREPERSON NO. 44: Yes, sir.	7	THE COURT: This is Sammy Moser.
8	THE COURT: -- you have been selected	8	
9	to be on this jury. So, here, I'm going to give you	9	VENIREPERSON NO. 48,
10	some instructions, and I've probably already done	10	SAMMY WAYNE MOSER,
11	this, but I don't want you to read the local paper or	11	VOIR DIRE EXAMINATION
12	watch the local news for the next few weeks, okay?	12	BY THE COURT:
13	VENIREPERSON NO. 44: Okay.	13	Q. Hold on, Mr. Moser, just a second, okay?
14	THE COURT: Because we just want you to	14	A. Okay.
15	get the evidence that comes in in this courtroom.	15	Q. I'm sorry, Mr. Moser, I just had to get your
16	With all due respect to the media, they don't always	16	questionnaire. All right. You are Sammy Moser; is
17	get it right. So, we want you to get it only from	17	that correct?
18	what comes in in this courtroom, okay?	18	A. That's correct.
19	VENIREPERSON NO. 44: Yes, sir. I've	19	Q. Okay. Mr. Moser, you have an ill relative;
20	seen some of that stuff in the media.	20	is that right?
21	THE COURT: Yeah, I mean, they don't	21	A. My dad.
22	always get it right.	22	Q. Okay. Your dad's got cancer?
23	VENIREPERSON NO. 44: Yes.	23	A. Yes, sir.
24	THE COURT: It's a fact, okay?	24	Q. And that may -- does he live here locally
25	VENIREPERSON NO. 44: Yeah, I know. I	25	or --

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1	A. He's in Oklahoma.	1	treatment." Do you remember the Defendant's name?
2	Q. He's in Oklahoma, okay. And would that -- I	2	A. No, I don't.
3	can tell you this trial is going to start -- I mean,	3	Q. You remember the facts?
4	obviously, we're going to take up some of your time	4	A. Barely. This was many years ago.
5	today, and then from here it's going to start like	5	Q. Yeah.
6	December 1, and it's going to go for at least a week,	6	A. It was a young man that was very -- it was
7	maybe two. Is this situation with your dad getting	7	very obvious he had some mental problems.
8	critical or --	8	Q. Uh-huh.
9	A. He's had his first chemo last week.	9	A. And he had killed his mother with a shotgun.
10	Q. Okay.	10	Q. Oh, okay. Well, then, you know a lot of the
11	A. And I don't know how that goes, I --	11	concepts we're going to go through, like it's the
12	Q. I'm sure he's up in age.	12	State's burden of proof, okay? Do you agree with
13	A. Yes, he is.	13	that?
14	Q. Okay. Well, I guess, really and truly, what	14	A. Uh-huh.
15	we need to know, and that's all of us, that's me,	15	Q. Could you hold the State to their burden of
16	that's the Prosecution, that's the Defense, we need to	16	proof? I mean, you've done this before, but -- but
17	know if that is going to be a distraction for you to	17	you could do this; correct?
18	the point where, you know, maybe sometime down the	18	A. Yes.
19	road you could be a great juror at service, or if it's	19	Q. Okay. So you have more experience than most
20	not. And only you can tell us.	20	folks that we have coming in here so I'm going to go
21	A. At this time, it's not a problem.	21	through some of these concepts a little quicker. And
22	Q. Okay.	22	you -- you stop me if it -- if I get too far ahead of
23	A. I mean, but I can't look into the future. I	23	you, but it's their burden of proof. The law says,
24	just --	24	"Look, State, you brought the charges, you've got to
25	Q. No, I understand that. But, I mean, are you	25	prove them, okay? You don't just get to say somebody
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1	going to be able to give us your full -- I mean,	1	did it and it's true and then they have to prove
2	assuming that, you know, the situation doesn't --	2	they're innocent." We don't do it that way in this
3	doesn't get any worse, I mean, are you going to be	3	country, okay.
4	able to give us your full attention in this case?	4	You don't have a problem holding them to
5	A. Oh, yeah.	5	their burden of proof?
6	Q. Okay. All right. Then let's -- let's move	6	A. No, I don't.
7	on to the next thing, and that is, we're looking for	7	Q. Okay. And then, of course, the burden of
8	jurors -- we're picking a jury here, obviously, you	8	proof -- and you know this from your prior service --
9	know that, and we're looking for two things and	9	is beyond a reasonable doubt, okay?
10	they're both important. But the first one is people	10	A. (Nodding head.)
11	that can keep an open mind, all right? That is, some	11	Q. And -- and you're nodding. And, you know, of
12	people come in here and they say, "You know what, I've	12	course, this isn't beyond all doubt or beyond a shadow
13	already made up my mind. I saw something on T.V.," or	13	of a doubt, it's beyond a reasonable doubt. It's the
14	whatever, "I've already made up my mind," or, "I'm	14	highest the standard that we have in criminal law.
15	already leaning one way or the another." We don't	15	Could you hold the State to that burden?
16	want that, okay, because that's not really fair, all	16	A. Yes.
17	right? And I need to know if that's you.	17	Q. Okay. Now, as part of our system, says,
18	A. That's not me.	18	"Look, State, you bring the charges, you prove them,
19	Q. Okay. Next thing we need to talk about, what	19	but, as part of that, until you prove anything against
20	this is all about, the type of case and the law	20	anybody, they're innocent until proven guilty."
21	involved in it, okay? Let's see, you have served on a	21	A. Yes.
22	murder case before.	22	Q. Okay? That is, "All right, you bring
23	A. Yes, sir.	23	charges, but, you know, you haven't told us anything.
24	Q. So you're very familiar, then, with what	24	You don't -- you don't just get to say, 'Hey, that
25	we're doing here. "Sent to insane hospital for	25	guy's guilty and it's so, you got to prove it," okay?

1 It's part of that innocent until proven. You believe
2 in innocence until proven guilty?

3 A. Yes.

4 Q. And you could follow that law?

5 A. Yes.

6 Q. That is, if this man here that's charged in
7 this case is innocent, and you could -- you could
8 believe him to be innocent until the State proves
9 otherwise?

10 A. That's right.

11 Q. Okay. Now, as part of that, the law says,
12 "Look, if he's innocent until proven guilty, if the
13 State's got the burden of proof, if the burden never
14 shifts over here, then Defense doesn't have to do
15 anything. They don't have to present any witnesses.
16 They don't have to present any evidence."

17 They might. They might not. As part of
18 that, Defendant doesn't have to testify. Constitution
19 says that. Bill of Rights. Okay? And it really
20 makes sense because if they've got the burden of proof
21 then they don't have to do anything.

22 You know, I submit there's a lot of
23 reasons why a defendant wouldn't want to testify.
24 Maybe his lawyers told him, "Don't testify. They
25 haven't proven their case." Maybe -- you know, not

1 Q. Okay. And in the case you had -- well, see,
2 you -- you know all about the bifurcated system, that
3 is, the case begins, guilt or innocence phase. You --
4 you sat on that, and you -- you wait and listen to all
5 the evidence, and then at the end of the case -- and
6 you know the process, you decide whether the State's
7 proven their case beyond a reasonable doubt; correct?

8 A. Correct.

9 Q. And you've done that. You understand that.

10 A. I do.

11 Q. And then in your -- in that case, in the
12 murder case, the punishment range is 5 years to 99
13 years or life, and, in some cases probation is a
14 possibility. Says -- I see from your questionnaire
15 that -- that the jury did assess punishment. And, as
16 you recall, the jury came up with a number, right?

17 A. Yes.

18 Q. Okay. So the jury comes up with a -- they go
19 back there and they deliberate, again, and they come
20 up with a punishment based upon what the law
21 prescribes as the punishment range.

22 A. Yes.

23 Q. Okay. Capital murder is not like that, it's
24 a little different, okay? Capital murder, there's two
25 options: Life imprisonment or death. Only two

1 all people are good speakers, you know? Maybe --
2 maybe he gets stressed out and stutters when he gets
3 stressed out. Maybe he's just not a good speaker, you
4 know.

5 But the question really is, some people
6 say, "You know, I'll hold it against him." Okay? Law
7 says you can't. Law says, "Look, you cannot -- State,
8 you cannot call him as a witness," But it goes even
9 further than that. Factfinder, whether it's, you
10 know, the jury or in some cases the Court, says,
11 "Look, factfinder, you can't hold it against him,
12 okay?" You can't say, "State, all right, I hear your
13 evidence. Defense -- Defense doesn't present anything
14 so you know what, I'm going to put a star over here.
15 It's a little bit more. I'm going to tip the scales a
16 little bit more because he didn't testify and I want
17 to hear both sides of the story."

18 I need to know if you can follow the law
19 and not hold it against him if he chose not to
20 testify?

21 A. I can.

22 Q. Okay. All right. Now, you -- you've sat on
23 a murder case before and I -- I assume it was a -- you
24 know, quote, unquote, plain murder, standard murder.

25 A. (Nods head).

1 options if the Defendant's found guilty of capital
2 murder, okay? But you don't say life or death, you
3 answer these questions. And we've got one up here.

4 If -- if a -- if the Defendant is found
5 guilty of capital murder, jury would then go to the
6 second phase, the punishment, and they'd -- if you'll
7 turn around here, they'd answer this question: "Is
8 there a probability that the Defendant would commit
9 criminal acts of violence that would constitute a
10 continuing threat to society," and the jury would
11 answer yes or no, okay?

12 Then on -- then you'd answer Special
13 Issue No. 2. "After taking into consideration all of
14 the evidence, including the circumstances of the
15 offense," that's your guilt and innocence phase stuff,
16 "And the Defendant's character and background and the
17 personal moral culpability of the Defendant, is there
18 a sufficient mitigating circumstance or circumstances
19 to warrant that a sentence of life imprisonment,
20 rather than a death sentence be imposed?" Okay? And
21 the jury would answer yes or no to that.

22 And that's basically everything that you
23 hear in the case. Okay? Maybe you hear good stuff
24 about the Defendant, maybe not. Maybe you hear the
25 facts of the case in the first part, and then you hear

<p style="text-align: right;">168</p> <p>1 a bunch of good stuff or maybe you hear a bunch of bad 2 stuff or maybe it's a mixed bag, okay, about his 3 background, what kind of guy he is, okay?</p> <p>4 A. Yes.</p> <p>5 Q. And then you'd answer that question. All 6 right? Okay. Now, do you think you could answer 7 these two questions?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. Now, what is capital murder? Well, 10 you know what murder is. Murder is the intentional 11 taking of the life of another. Capital murder is like 12 murder plus. Okay? The legislature has said there 13 are certain murders, and because of the facts and 14 circumstances they become capital. And what's 15 capital? Capital means the death penalty is a 16 possibility.</p> <p>17 In this case, the State has alleged 18 murder while in the course of committing or attempting 19 to commit a robbery, okay? So we have -- and then 20 they're together, murder plus robbery or attempted 21 robbery. They don't just get to prove one or the 22 other. Okay? They may be guilty of one or the other, 23 but unless they prove the whole thing together, they 24 don't get capital murder in this case. You understand 25 that?</p>	<p style="text-align: right;">170</p> <p>1 they take an oath to render a true verdict based upon 2 the law and the evidence presented to you. Okay. And 3 the jury says yes, and then we begin. I need to know, 4 can you take that oath to sit as a juror and listen to 5 the evidence and render a true verdict on guilt or 6 innocence on the guilt or innocence phase of this 7 trial?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. Now, the next thing. If -- if 10 Defendant is found guilty tea of capital murder by the 11 jury then we go to the second phase. The next 12 question, of course, is can you -- can you answer 13 these questions? And before you answer that, I want 14 to tell you that some people say, "Look, I could sit 15 as a juror on the guilt or innocence phase, but when I 16 got to the punishment, I could not answer questions 17 that could lead to someone's death," or some people 18 tell me, "Look, they find -- if we can find him guilty 19 of capital murder, I don't care about the law and all 20 this stuff. I'm just going to -- it's going to be 21 death for me. I'm not going to consider any of this 22 stuff. That may be the law, but that's not -- I'm not 23 going to apply it or follow it."</p> <p>24 I need to know that you could take the 25 oath, not only to -- now, you've already told me on</p>
<p style="text-align: right;">169</p> <p>1 A. I understand that.</p> <p>2 Q. Okay. And that -- and, of course, what's 3 robbery? Well, that's the -- you know what robbery 4 is, right? That's the forceable taking of something 5 or threatening to take something from somebody else by 6 force, okay?</p> <p>7 A. Yes.</p> <p>8 Q. All right. So, they have to do it all.</p> <p>9 Now, the law says that the State has to 10 prove all of the elements of capital murder to get a 11 conviction. And I don't know how many there are. 12 There's about seven, eight, nine, something like that. 13 They got to prove all of them. They don't get to just 14 get pretty close. They don't get eight out of nine or 15 seven out of eight to get there. The law says you got 16 to prove them all, okay?</p> <p>17 Could you -- could you hold the State to 18 that burden, --</p> <p>19 A. Yes.</p> <p>20 Q. -- to prove them all? All right.</p> <p>21 Now, I mean, at the beginning of the case 22 -- and I'm sure you remember this from your prior 23 service -- you take an oath, right?</p> <p>24 A. Yes.</p> <p>25 Q. Each of the jurors raise their right hand and</p>	<p style="text-align: right;">171</p> <p>1 the guilt or innocence phase to render a true verdict 2 based upon the law and evidence, but could you 3 truthfully answer these two questions if called to do 4 so?</p> <p>5 A. Yes.</p> <p>6 THE COURT: Okay. All right. I'll turn 7 the floor over to Mr. Skurka.</p> <p>8 MR. SKURKA: Thank you, Judge.</p> <p>9 VOIR DIRE EXAMINATION</p> <p>10 BY MR. SKURKA:</p> <p>11 Q. Hi, Mr. Moser. My name is Mark Skurka. I'm 12 the first assistant district attorney. This is 13 Geordie Schimmel. He's also an assistant district 14 attorney that works and is assigned to Judge Galvan's 15 Court. And, together, we'll be presenting this case 16 to you if you're selected on this jury.</p> <p>17 I want to the start off by telling you 18 there's no right or wrong answers to anything you say. 19 We just want to hear what you truly feel about some of 20 these issues or laws that we're going to talk about 21 this. Now, the reason that this is such an important 22 case, of course, is because John Henry Ramirez, over 23 here, the Defendant, could be facing the death 24 penalty.</p> <p>25 A couple of things that we need to start</p>

<p>1 off with. When I say, "could be facing," that's 2 because he's got to be found guilty first and right 3 now he's presumed innocent. Do you agree with that? 4 A. I agree with that. 5 Q. In other words, the State has to prove the 6 case beyond a reasonable doubt. And that's in this 7 case and in every criminal case, whether it be 8 shoplifting or D.W.I. Do you believe that concept of 9 law? 10 A. I do. 11 Q. The law also says that death penalty is not 12 automatic. Sometimes people tell me -- and I don't 13 know if you knew this before but a lot of times people 14 have told us, "Well, I thought every murder case is 15 eligible for the death penalty." And we have to tell 16 them, "No, only certain cases that the legislature has 17 set out to be capital murder cases." And I know the 18 Judge says, "plain murder," we say, "plain murder." 19 It's not really plain, but what capital murder is, 20 it's got to be kind of an elevated-type of murder, 21 murder plus something else. 22 In other words, like, you know, killing 23 somebody while you're robbing, raping, kidnapping 24 them, burglarizing them, you know, killing a kid under 25 six, killing a cop on duty, that type of stuff. Only</p>	<p>172</p> <p>1 you murder somebody, you must automatically be killed 2 yourself." But the law in Texas is essentially this: 3 There's two choices, death or life in prison. 4 Sometimes people who get convicted of capital murder 5 get the death sentence after they hear all the 6 circumstances. Sometimes people who are convicted of 7 capital murder get a life sentence, depending on the 8 circumstances and background. 9 Do you agree with that scheme, that it 10 should be one or two of those things? 11 A. I do. 12 Q. In other words, it's not always going to be 13 capital murder, to where you're convicted and get the 14 death penalty, there's a chance you might get a life 15 sentence, depending on what a person's background and 16 history is, correct? 17 A. Correct. 18 Q. Do you believe that? 19 A. I do. 20 Q. So you can consider both life in sentence or 21 the death penalty equally? 22 A. Yes. 23 Q. You know, and I'm -- and I should have said 24 "Based on the circumstances." 25 A. Well, that was the key word.</p>
<p>173</p> <p>1 those are even qualified to be a death penalty case. 2 So that's why the charges are brought 3 against him, is because we're alleging, the State is 4 alleging that he committed murder while in the course 5 of committing robbery, and "robbery" meaning taking 6 something by force or by threats of force. It doesn't 7 even have to be a completed robbery. In other words, 8 you could be doing the robbery and kill somebody and 9 it could be capital murder. So, it's got to kind of 10 be both of those things. 11 When we talk about the death penalty, 12 some people propose this, "Well, I believe in the 13 death penalty. I think it's a good law. I think it's 14 good and everything, but, please, don't make me part 15 -- to make that decision." Now, you probably agree 16 with me, it's an awesome responsibility if you get 17 called upon to be on this on this jury, correct? 18 A. Yes, sir. 19 Q. How do you feel about being on that type of a 20 jury? 21 A. Well, I've never spent a lot of time, other 22 than my belief system. I just -- I believe that if 23 you commit a crime, you should pay for it. 24 Q. Okay. And the law says -- and I know that 25 some people say, "Well, it's an eye for an eye. If</p>	<p>175</p> <p>1 Q. I -- I almost left it out, but I got it in 2 there. And -- and that's what the law says. The law 3 and the Judge, in order to see if you qualify, has to 4 make sure that you're open-minded, that you're not 5 going to say, "Well, I'm automatically going to say 6 he's guilty just because he's sitting there." Are you 7 going to do that? 8 A. No. 9 Q. The Judge is also going to want to know if 10 you're automatically going to give him the death 11 penalty just because he's found guilty. Are you going 12 to wait till you hear everything and then decide 13 should he get the death penalty or should he get a 14 life sentence? 15 A. I'm going to refer back to the circumstances 16 and at the end of the arguments. 17 Q. Sure. The circumstances and the evidence. 18 Because right now you have no idea of his background, 19 if he was a good boy, was he a bad boy; he's been to 20 prison 20 times before, has he never been to prison, 21 you know, any of that kind of stuff. All we have to 22 do is make sure that you're equal and you can listen 23 to both -- everything and decide what's the proper 24 punishment. Can you do that? 25 A. Yes.</p>

1 Q. How do you feel about having to make that
 2 decision, though? I mean, some people -- this is why
 3 I say that. Some people that first day, you know, we
 4 had those 2- or 300 people in there, and the Judge
 5 came down and says, "Okay, folks, this is a criminal
 6 case and that man over there is facing -- could be
 7 facing the death penalty," what -- what struck your
 8 mind when you heard it was that kind of case?

9 A. Well, when someone's life is at stake, you --
 10 that's not an easy thing to -- I mean, that's always a
 11 problem.

12 Q. Okay.

13 A. But you -- I'm a citizen of this United
 14 States and we have to protect each other. And I think
 15 that's the way we do it, is we -- we have a good court
 16 system.

17 Q. That's a good answer because that's the way
 18 it should be, right?

19 A. Yes.

20 Q. In other words, you have laws to protect
 21 society, correct? If somebody breaks those laws, they
 22 have to face the consequences. But, on the other
 23 hand, it's not something that -- that -- a fun thing
 24 to do, sitting on a jury like that, or something that
 25 you're happy about doing. It's almost one of those

1 you to answer the questions in such a way that that
 2 man right there is executed."

3 Can you do that if the evidence calls for
 4 it?

5 A. If the evidence shows that.

6 Q. Okay. I'm going to tell you -- ask you to do
 7 another thing. If the evidence shows that he should
 8 get a life sentence, can you vote for a life sentence,
 9 too?

10 A. Yes.

11 Q. Okay. So it doesn't matter. You're going to
 12 go with whatever the evidence says, right?

13 A. Whatever the evidence says.

14 Q. That's fair enough. Now, let me tell you,
 15 we've talked about why it's murder, let me talk about
 16 -- or capital murder, let's talk about what happens in
 17 the scheme of things different from the other trial
 18 you were on and other cases. Generally speaking, a
 19 jury finds -- there's two parts, guilt or innocence,
 20 and the punishment phase.

21 Generally speaking, in the guilt or
 22 innocence phase, you hear just what happened that day,
 23 you know, what -- what happened at the crime, what he
 24 did, what he didn't do, did he do it, you know, is he
 25 guilty or not?

1 things like, "Hey, I wish I didn't have to sit on a
 2 jury, but if I'm called to do my civic duty, I'm going
 3 to be do my civic duty." Is that kind of where you
 4 fit in?

5 A. Yes.

6 Q. And it's probably important, too, that all
 7 that power doesn't rest with one person. In other
 8 words, Judge Galvan, he's a judge, but he can't
 9 sentence somebody to death. The district attorney,
 10 Carlos Valdez, can't say, "Oh, I'm going to sentence
 11 this guy to death." The people have that power with
 12 the jury. So it doesn't matter how mad the Judge is
 13 at somebody, or the D.A. is mad at somebody, only 12
 14 people, citizens like you, can make that decision.

15 A. I'm glad.

16 Q. Fair system to you?

17 A. I'm glad it's that way.

18 Q. And it should be that way, right? We don't
 19 want to have a dictator telling us what to do and how
 20 to do that. But make no mistake about it, there's
 21 going to be a time, I've told you-all that the very
 22 first day, the State is going to seek the death
 23 penalty and there's going to be a time I'm going to
 24 stand in front of this jury, and say, "Based on the
 25 evidence, based on the circumstances, I'm going to ask

1 The second part of the trial you might
 2 get to hear additional evidence. Instead of just that
 3 day, you might want to hear about his background.
 4 Well, this guy's been to prison 20 times before, or
 5 this guy was an Eagle Scout and made good grades in
 6 school, was in honor roll, you know? See what I'm
 7 saying? You might want to hear some more background
 8 to make a decision.

9 Probably in your case before you got to
 10 hear about his medical background or psychiatric
 11 background before you can make a decision. You didn't
 12 make a decision on his punishment just by the case,
 13 you'd make it on all the background.

14 Now, in Texas what we do is -- we call it
 15 "The punishment phase," but in the capital murder
 16 case, we don't just vote death or life and check off
 17 one or the other. You answer these two questions
 18 based on everything. And they're behind you on the
 19 board, and let's look at the first one. It says, "Is
 20 there a probability that the Defendant would commit
 21 criminal acts of violence that would constitute a
 22 continuing threat to society?" In other words, is he
 23 -- is he going to be a danger in the future to
 24 society?

25 In that question, some of the key words I

<p style="text-align: right;">180</p> <p>1 want you to look at is it says, "Is there a 2 probability?" It doesn't say it's a certainty. I 3 mean, there's no way I could prove to you for sure 4 what's going to happen in the future, and the law 5 doesn't require me to. It just says, "Is there a 6 probability," is it more likely than not like that 7 he's going to do these things?</p> <p>8 It also says you don't even have to wait 9 and see -- wait and see if he's going to murder again. 10 It just says, "criminal acts of violence." Some 11 people say, "Well, do I think he's going to murder 12 again or commit another capital murder?" It doesn't 13 require that level. It just says, "criminal acts of 14 violence."</p> <p>15 And the last phrase says, "a continuing 16 threat to society." You've probably heard that 17 before, right?</p> <p>18 A. Yes.</p> <p>19 Q. Sometimes people come up to me and say, "Well, why is the State seeking a death penalty? Why do you have to have a death penalty? Why don't you just give him a life sentence and lock him up in prison, then he'd be away from society." And I always say, "Well, wait a minute, what else is -- who else is in a prison?" There's other inmates, there's guards,</p>	<p style="text-align: right;">182</p> <p>1 "anything that would lessen or make less severe the punishment." 2 In other words, he did the crime, but is there any reason, is it a sufficient reason to lower the sentence to life, instead of death? Is there, like -- some people call it different things, like "extenuating circumstances" or "reasons," or something like that. And mitigating circumstances just basically means anything that reduces the defendant's moral blameworthiness, anything that would lessen or make less severe the punishment.</p> <p>3 In other words, is there any reason to cut him a break and give him a life sentence instead of death? Let me give you an example. Two burglars. You have two burglary cases that are completely separate, and you're called to sit and decide the punishment of these people. They're both guilty of burglary. That means they went into somebody's house and stole something without permission.</p> <p>4 The first burglar, you find out the facts of that case are he kicked in the door, broke down the door, ransacked the whole house, stole all the money, jewelry, T.V., V.C.R.s, everything of value. And then you also hear about his background is this is not his first burglary. He's been into the prison three times</p>
<p style="text-align: right;">181</p> <p>1 there's people that work in the prison, like clerical 2 people, the warden and his staff, things like that. 3 So if you really put somebody in prison, does that 4 mean he can't hurt somebody else again?</p> <p>5 A. No.</p> <p>6 Q. No. And you've probably heard of that happening before, right?</p> <p>7 A. Yes.</p> <p>8 Q. So, we don't of this system where you're put on a desert island and you'll never see another human being so you can't hurt anybody. So would you agree with me that prison can still be considered part of society, right?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. So the first question, based on all the evidence, both the circumstances of the crime and the surrounding circumstances and maybe his background, you would have to decide is guy going to be a danger in the future, is he capable of hurting somebody in the future, yes or no?</p> <p>11 A. (Nods head.)</p> <p>12 Q. Then you go to the second question. The second question is what we call "the mitigating circumstances question." And, essentially, what that says is, mitigating is a big word that basically means</p>	<p style="text-align: right;">183</p> <p>1 before for burglary, stop. 2 Go to the second guy. The second guy is also guilty of burglary. What he did was go into somebody's house and take something without permission but the circumstances are a little different. He didn't kick down a door or break a window to get in. The back door was unlocked so he opened it and went in the kitchen. He didn't go into the house, even though the house had jewelry, money, T.V., V.C.R. and stereos, he didn't go take any of that stuff. He took a loaf of bread and some food because he lost his job and his kids were hungry and he needed to feed his family.</p> <p>13 And you find about his background, and, lo and behold, he's never even been arrested before. This is the first time he's ever gotten charged with a crime. He hasn't been to prison three times before.</p> <p>14 So looking at those two widely separate things, they're both guilty of burglary, right? It's still wrong to go into somebody's house and take something, but would you treat those guys exactly the same?</p> <p>15 A. No.</p> <p>16 Q. Of course not. What would you do? The first one has aggravating circumstances and you'd probably</p>

<p style="text-align: right;">184</p> <p>1 make the sentence go up; the second one has mitigating 2 circumstances and it would go down. It's very hard to 3 say what a mitigating circumstance is but you can see, 4 and the second part is, he didn't break in and didn't 5 destroy property. All he stole was food. He didn't 6 take anything else. He didn't even have a record. So 7 you'd probably treat that guy lesser than the other 8 guy.</p> <p>9 And that's what that question is all 10 about. Is there a reason to go to a lesser sentence 11 of life instead of death? Is there enough reason to 12 go? Is it sufficient?</p> <p>13 Now, what is a mitigating circumstance 14 is up to the jury to decide. You can't -- the Judge 15 is not going to tell you, "This is a mitigating 16 circumstance, this is a --" it's up to the jury, and 17 it's just not defined that way. The point you have to 18 do to be qualified on this jury is you have to listen 19 to all the evidence and the circumstances and see if 20 there's anything that would make you lower the 21 sentence. For example -- but it's up to the jury.</p> <p>22 Some people may say, "Well, yeah, he was 23 an Eagle Scout or he was on the honor roll in school. 24 but that was years ago and he's still got to pay for 25 what he did in this crime." Other people may say,</p>	<p style="text-align: right;">186</p> <p>1 background or bad background, "and his personal moral 2 culpability, is there sufficient --" is there enough 3 circumstances or mitigating circumstances to warrant 4 that you life -- sentence to life, instead of a death 5 penalty?</p> <p>6 It's -- I like to tell people it's like a 7 checks and balances system. It looks like he's 8 heading toward the death penalty, but the jury is 9 asked to look at everything else just to make sure 10 that there's nothing that would lower the sentence. 11 If there is something, you should lower it to a life 12 sentence. If it's enough, that's what the law says, 13 lower it to a life sentence. But if there's not 14 enough, if it's not sufficient enough, you would 15 answer that question no.</p> <p>16 So if you answer the first question yes, 17 he's a continuing threat to society, and no, there's 18 no reason to lower the sentence, he gets a death 19 sentence. If you answer it any other way he gets life 20 in prison. Does that make sense to you?</p> <p>21 A. Yes.</p> <p>22 Q. It's -- it's kind of a careful consideration 23 for the jurors. It's like you said earlier, you know, 24 nobody wants to do this but they got to do their civic 25 duty, and I think the Judge is telling you, "Hey, look</p>
<p style="text-align: right;">185</p> <p>1 "Well, look, you know, he's not all bad. He -- he was 2 an Eagle Scout, he was on the honor roll, so maybe we 3 should cut him a break and give him something less." 4 See what I'm saying?</p> <p>5 A. Uh-huh.</p> <p>6 Q. It's the same evidence but different people 7 treat it different way. And the question is, you have 8 to do that balancing test and say "Is it enough, you 9 know? Sure he did some good things back in his life. 10 Sure he helped his mother. Sure he was a good kid in 11 school, but does it outweigh what he did in this 12 crime"? See what I'm saying?</p> <p>13 A. Yes.</p> <p>14 Q. So essentially what's happening is, you found 15 the guy guilty of capital murder. You've answered the 16 Special Issue No. 1 yes, "Yes, I think he's a 17 continuing threat to society," but before you impose 18 the death penalty, the Judge gives you this question 19 and he says, "Stop and wait. Look at -- take into 20 consideration all of the evidence, look at the big 21 picture, including the circumstances of the offense," 22 you know, that -- the crime itself, how heinous was 23 it, how bad it was, whatever, "the defendant's 24 character and his background," does he have good 25 character or bad character, does he have a good</p>	<p style="text-align: right;">187</p> <p>1 at everything. It's a tough decision. It's a big 2 decision. See if there's any reason to lower it. If 3 there's not, there's not, and you do your duty. If 4 there is, there is and you do your duty." Okay.</p> <p>5 So you open-minded to listen about maybe 6 background stuff, information.</p> <p>7 A. Yes.</p> <p>8 Q. He may put on evidence, he may not. I don't 9 -- I don't know, but you have to be able to consider 10 everything before you make that decision, okay? But 11 it's up to the jury.</p> <p>12 One law that the Judge may tell you, too, 13 is voluntary intoxication is not a defense to crime. 14 "Voluntary intoxication." In other words, if you go 15 get yourself drunk or high on drugs and you go commit 16 a crime, can you say that's an excuse for the crime? 17 No. The law says no. You can't go rob a bank and 18 say, "Well, I'm not guilty because I was drunk, you 19 know, when I robbed that bank" No, can't do that.</p> <p>20 But the Judge may say that that's a 21 possible mitigating circumstance. You can't consider 22 it as an excuse of crime, but maybe that's a reason to 23 go lesser on the sentence. Maybe it is. Maybe it 24 isn't. Maybe some people say, "Well, I don't care if 25 he was drunk or not. He still did the crime." Some</p>

<p style="text-align: right;">188</p> <p>1 people say, "Well, he was drunk. Let's give him a 2 break." See what I'm saying?</p> <p>3 A. Uh-huh.</p> <p>4 Q. So that's one of the laws. Do you have any 5 question about any of the -- the special issues that 6 we talked about?</p> <p>7 A. No.</p> <p>8 Q. Does that -- does that kind of make sense to 9 you, the way it kind of follows down the line?</p> <p>10 A. It's pretty clear.</p> <p>11 Q. Okay. So the bottom line is you'll be 12 open-minded. You haven't decided you're going to give 13 a death sentence or a life sentence, right?</p> <p>14 A. No.</p> <p>15 Q. You'll wait --</p> <p>16 A. No.</p> <p>17 Q. -- till you hear everything. I know that 18 sounds silly, but I have to ask, and make sure you're 19 not leaning one way or the other.</p> <p>20 And you understand that being charged 21 with the case doesn't mean he's guilty. Just because 22 he's been indicted by the grand jury doesn't 23 necessarily mean he's guilty of the crime. He's 24 presumed innocent. You believe in that?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">190</p> <p>1 you were, God forbid, charged with a crime, why should 2 you have to prove that you were not guilty? I mean, 3 the State has to prove you're guilty if they're 4 bringing those allegations. Okay? Does that answer 5 your question?</p> <p>6 A. Yes.</p> <p>7 Q. And beyond a reasonable doubt basically means 8 -- it doesn't mean beyond all doubt, beyond any 9 doubt. It just means beyond a reasonable doubt. In 10 other words, there's no way I can prove this to you, 11 you know, 100 percent, and the -- and the law doesn't 12 require me to. It just says prove it beyond a 13 reasonable doubt.</p> <p>14 So you can consider life, if the verdict 15 -- I'm sorry, if the evidence points that way; 16 correct?</p> <p>17 A. Yes.</p> <p>18 Q. And you can consider death if the evidence 19 points that way; correct?</p> <p>20 A. Yes.</p> <p>21 Q. Do you have any questions about anything 22 we've talked about?</p> <p>23 A. Not so far.</p> <p>24 MR. SKURKA: Okay. I think that's all 25 the questions I have of you, Mr. Moser. I'll let the</p>
<p style="text-align: right;">189</p> <p>1 Q. And the Fifth Amendment. He may testify, he 2 may not. But if he doesn't testify, the Judge is 3 going to tell you you can't hold that against him. Do 4 you believe that?</p> <p>5 A. Yes.</p> <p>6 Q. Okay.</p> <p>7 A. I have a question now.</p> <p>8 Q. Sure.</p> <p>9 A. The Defense doesn't have to testify.</p> <p>10 Q. Right.</p> <p>11 A. Or give evidence. It's all left to you.</p> <p>12 Q. Correct. That's my burden in this criminal 13 case and in every criminal case, whether I'm trying a 14 D.W.I. or shoplifting case. Because America has set 15 it up that you're not considered guilty and you have 16 to prove your innocence, the State has to prove he's 17 guilty beyond a reasonable doubt. The Defendant 18 doesn't have to put on any testimony. They don't have 19 to put on any witnesses at all. The Defendant doesn't 20 have to testify if he doesn't want to. And under our 21 system he's allowed that right and you can't hold it 22 against him.</p> <p>23 It's like the Judge said very early on, 24 you know, "If the State is going to bring charges, the 25 State has got to prove the charges," okay? I mean, if</p>	<p style="text-align: right;">191</p> <p>1 Defense lawyers talk to you now. Thank you, sir, for 2 your attention.</p> <p>3 MR. GARZA: May I proceed, Your Honor?</p> <p>4 THE COURT: Yes.</p> <p>5 VOIR DIRE EXAMINATION</p> <p>6 BY MR. GARZA:</p> <p>7 Q. Good afternoon, Mr. Moser.</p> <p>8 A. Good afternoon.</p> <p>9 Q. I'm Ed Garza. I think I introduced myself to 10 you and the rest of the panel when we converged 11 downstairs a few weeks ago to fill out these 12 questionnaires. And this is Mr. Jones sitting next to 13 me. He is my Co-Counsel in this matter. And our 14 client, Mr. John Henry Ramirez. Okay?</p> <p>15 What did you think about this 16 questionnaire when you started reading through it and 17 filling it out?</p> <p>18 A. It's very extensive.</p> <p>19 Q. Asks a lot of questions, doesn't it?</p> <p>20 A. Yes, it does.</p> <p>21 Q. We're --</p> <p>22 A. Not quite sure how to fill each one out. I 23 mean, it's -- you do your best.</p> <p>24 Q. Okay. Personally, I know it's something 25 maybe you don't talk about on a daily basis, but what</p>

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1	is your attitude toward the death penalty?	1	that. These are people that have been actually --
2	A. My attitude toward the death penalty?	2	have factually found innocence, you know, for a lot of
3	Q. Yes, sir.	3	reasons, they --
4	A. I -- you may not like my answer.	4	A. They didn't get there by accident, it was by
5	Q. Like we said, we have -- there is no wrong or	5	evidence that -- wrong evidence, I -- I feel.
6	right answers --	6	Q. Sometimes, would you believe, it was -- I
7	A. Okay.	7	mean, if you -- if you've read some of these articles,
8	Q. -- and that's why -- it's kind of -- Mr.	8	there's a -- there's a leading article in this month's
9	Skurka asked a lot of questions and I heard you say,	9	issue of Texas Monthly where there's several people
10	yes and no, and yes and no, and yes and no, but I	10	whose stories have sort of been brought out about
11	never heard --	11	their wrongful convictions, okay --
12	A. If you read my paper --	12	A. Uh-huh.
13	Q. Yes.	13	Q. -- and how they served 15, 20, you know,
14	A. -- I -- I grew up in the church.	14	some-odd years in prison until finally they were
15	Q. From what I can tell, you're a deacon at your	15	exonerated.
16	church, are you not?	16	A. I think that's great.
17	A. Yes.	17	Q. You know? And -- and thank God, at least,
18	Q. Yes, sir.	18	they were -- they're among the living. There are
19	A. And I -- I have a great understanding of	19	people that lived through the ordeal, okay?
20	God's Word, and I'm -- and I believe, from what I read	20	A. Yes. And I -- but I -- you know, I'm not
21	in the Scripture, that God is the author of -- of	21	holding anyone responsible. All of us make mistakes,
22	punishment phases, and I base my decisions on what He	22	even prosecutors.
23	has given in His Scripture. So, I -- if you take	23	Q. Sure. Even defense lawyers.
24	someone's life, you got to answer for it.	24	A. Yes.
25	Q. Yes, sir. So according to some of the	25	Q. We're certainly not perfect. But this is the
	193		195
1	Scripture, of course, there's the proverbial "Eye for	1	kind of case that is so serious that we have to put
2	and eye."	2	forth an enormous amount of -- of skill, knowledge,
3	A. I think I put that in my deal.	3	experience, fairness, to hope, to hope that we get it
4	Q. Yeah. Now, do you -- do you believe that	4	right.
5	there is a big difference, which obviously there is,	5	A. Yes.
6	between God's Law and man-made law?	6	Q. Do you agree with that, sir?
7	A. No, because I think our Constitution was	7	A. I agree with that.
8	based on that. And our laws are -- our laws are, I	8	Q. Because if we don't, and like you've stated
9	think, fair.	9	here, something does go wrong and we unjustly or -- or
10	Q. Okay.	10	wrongfully, you know, convict this man, and he is
11	A. And if we didn't have that -- God gave us	11	sentenced to a death sentence of some sort, before
12	that Constitution, I'm convinced of that, so -- and we	12	anything else happens and he gets executed, God
13	have people that are much smarter than I am that put	13	forbid, and we find out later on that we didn't get it
14	those together. And I think it's a very fair system.	14	right, how would that make you feel?
15	Q. Okay. You answered that in your	15	A. Make me feel bad, just like it does for all
16	questionnaire when you were asked, "Do you think the	16	of those men that were unjustly. But our court system
17	death penalty is applied fairly," you indicated, "No."	17	is still the greatest in the world.
18	And your explanation was that, "Some cases that are	18	Q. I agree with you. I agree with you.
19	proven wrong through D.N.A. testing."	19	A. Even though there is injustice.
20	A. We have a lot of people, I feel, that was --	20	Q. Yes, sir. Do you understand the concept of
21	went through cases, and -- and I don't know why	21	the presumption of innocence? I think you do.
22	they're -- it could have been jury, it could have been	22	A. Yes, I do.
23	evidence, but now they're free based on D.N.A.	23	Q. Right now, if I asked you to render a
24	evidence. Would you not agree?	24	verdict, what would your verdict be?
25	A. Yes. I'm -- we're -- we're big proponents of	25	A. It would not -- I have no -- I do not know

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1	the man. I've heard nothing about him.	1	Q. Is that the way you feel?
2	Q. Okay. Then you don't understand the	2	A. Yes.
3	presumption of innocence.	3	Q. So honestly, honestly speaking, if that's the
4	A. Well, he's innocent until proven guilty.	4	way you feel, then you have a certain bias about this
5	Q. So, right now, if I asked you to render a	5	case. You would want to hear something from our
6	verdict, what would your verdict be?	6	client, you would want to hear something that would
7	A. It would be innocent.	7	help you understand why you he did it.
8	Q. Right. Okay. All right, I just want to make	8	A. Certainly. I want to hear both sides.
9	sure you do understand it.	9	Q. But you understand that that's not the law.
10	A. Oh, yeah.	10	A. That's not the law. I know that.
11	Q. Okay. Reasonable doubt. What does that mean	11	Q. But you would still have that feeling or have
12	to you?	12	that -- that leaning, that inclination that would, and
13	A. Reason -- if it -- if I -- if there's	13	could possibly, --
14	something in evidence that just doesn't add up, I have	14	A. Yes.
15	to take that into consideration.	15	Q. -- hinder your ability to take the oath in
16	Q. Some sort of doubt based on reason.	16	this case possibly; or hinder your ability to serve as
17	A. Uh-huh.	17	a fair and impartial juror in this case. Would that
18	Q. Is about as easy as I can try to define it	18	be fair safe to say?
19	because there really is no definition, you have to use	19	A. Uh-huh.
20	your common sense. And the burden of proof -- I	20	Q. You understand what I'm trying to tell you?
21	noticed that you asked Mr. Skurka, and you wanted to	21	A. Yes. You're trying to tell me that you don't
22	ask him a question about are -- you know, do you have	22	have to say anything. But what I just said was I
23	to prove this, are you -- what were you trying to get	23	would like to hear both sides of the story and...
24	to in your question there?	24	Q. Okay.
25	A. Well, I was wondering if you was going to	25	A. But I, you know --
	197		199
1	have anything to say.	1	Q. Well, let me -- let me just finish asking
2	Q. And what if I didn't?	2	you.
3	A. He -- he explained it.	3	A. Okay.
4	Q. And I'm not going to saying I --	4	Q. Say you don't. Say you don't. Is that
5	A. He said it's all --	5	something that is going to fall -- in your
6	Q. -- I'm not saying I won't, but what if I	6	decision-making process, is it going to fall in their
7	didn't, would it bother you?	7	column or is it going to fall in our column?
8	A. I have to hear what he has to say and make a	8	A. Well, you -- the law was read to me.
9	decision based on that, but I would certainly think	9	Q. And we need truthful, honest answers, Mr.
10	that you would have something to say.	10	Moser.
11	Q. Okay. But you understand I don't have to.	11	A. Oh, yeah.
12	A. Right, I understand that.	12	Q. Okay? And, you know, like we said, if -- you
13	Q. We're the ones being accused. They're the	13	know, we need to know this.
14	ones bringing the charge. It's their burden. We	14	A. Huh. I -- I could listen to the burden of
15	don't have to do anything. We don't have to say	15	proof. You got me trapped.
16	anything. That's our Fifth Amendment right. Do you	16	Q. Well, I don't really. I just -- and I'm not
17	believe in that?	17	trying to corner you, but do need to know how you feel
18	A. Yes, I do.	18	about it.
19	Q. Okay. Or do you -- and you can tell us if	19	A. Yeah.
20	you feel otherwise, if you feel like, "Well, you know,	20	Q. And some people do, and that's okay. It's
21	if somebody is accused of a pretty serious crime and	21	absolutely okay. It's human nature, I think, quite
22	they're looking at the death penalty I think they	22	honestly. Even though we sit here as lawyers day in
23	better tell me a little bit about what's going on	23	and day out trying to try these cases, and we ask that
24	here."	24	question of people and they say they understand the
25	A. I would think so.	25	concept, but they still say, "Yeah, but you know what?

200 1 I just don't know how that I can -- I can honestly 2 make a decision if I don't hear from the other side." 3 A. Yeah, I agree with you. 4 Q. And that's what we need to know. Do you 5 agree with that? 6 A. Yeah. 7 MR. GARZA: Your Honor, can we have a 8 hearing outside the presence of the juror? 9 MR. SKURKA: May I have just a couple of 10 follow-up questions, Judge? 11 THE COURT: Yeah, you may, but... 12 VOIR DIRE EXAMINATION 13 BY MR. SKURKA: 14 Q. Mr. Moser, are you saying that you would have 15 to hear from them before you can make a decision in 16 this case? 17 A. Well, I was thinking there for a while that I 18 could hear the burden of proof from your side -- 19 Q. Uh-huh. 20 A. -- but the way he phrased the question, it 21 kind of caught me off guard, and I -- you know, I'm 22 not saying that you wouldn't give me all the 23 information, but if I'm making a decision based on a 24 man's life I want to hear all of the evidence. 25 Q. So would you require them to put on	202 1 appreciate your time coming down here and sharing your 2 thoughts with us. Thank you very much for your 3 honesty. 4 VENIREPERSON NO. 48: Thank you, sir. 5 MR. GARZA: Thank you. 6 MR. SKURKA: Thank you, sir. 7 (Venireperson exits courtroom.) 8 MR. SKURKA: I don't know if you want 9 to get this on the record or not, Judge, but we have 10 one tomorrow that we've already agreed on -- 11 THE COURT: Oh, what number is that? 12 MR. GARZA: No. 59. 13 MR. SKURKA: No. 59. 14 MR. GARZA: Ms. -- Ms. Rutter. 15 Apparently, she has a hearing impairment, Your Honor, 16 that will probably preclude her from being a -- 17 THE COURT: Okay. Then 59 is excused by 18 agreement. I don't think -- I think Ann took it off 19 the list. 20 (Evening recess.) 21 22 23 24 25
201 1 something? 2 A. I would think they would. 3 Q. Okay. You understand that's not the law, 4 though. 5 A. I understand that's not the law. 6 Q. But that would interfere with you? 7 A. That's -- I don't have an answer for that. 8 MR. SKURKA: Okay, Judge, that's all the 9 questions I have. 10 THE COURT: Okay. Why don't you wait in 11 the jury room for a second, Mr. Moser -- 12 VENIREPERSON NO. 48: Okay. 13 THE COURT: -- while I speak with these 14 guys. 15 (Venireperson exits courtroom.) 16 THE COURT: All right, Mr. Garza? 17 MR. GARZA: Challenge for cause. 18 THE COURT: Sustained. 19 MR. GARZA: Thank you, Your Honor. 20 MR. SKURKA: You're always confusing 21 these people, Ed. 22 THE COURT: Bring him on in. 23 (Venireperson enters courtroom.) 24 THE COURT: All right. Mr. Moser, you 25 were not selected to be on this jury. We do	

1 THE STATE OF TEXAS)

2 COUNTY OF NUECES)

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901 Leopard, Room 901
Corpus Christi, Texas 78401
(361) 888-0658